90-1725

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 9, 1991

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit misapplied this Court's decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) and *Department of Treasury, I.R.S. v. Federal Labor Relations Board*, 110 S.Ct. 1623, 1629-30 (1990), when it deferred to a definition of "public bodies" under the Niagara Redevelopment Act (NRA or the Act), 16 U.S.C. § 836(b)(1), adopted by the Federal Energy Regulatory Commission (FERC or the Commission) on the mistaken assumption that its definition was mandated by the Second Circuit's own decision in an earlier case?

2. Whether the Commission's holding that the State of Vermont's Department of Public Service (VDPS) was not a "public body" under the NRA (and therefor ineligible for cheap hydroelectric "preference power") because it did not physically control the operation of distribution facilities, was inconsistent with the plain language and intent of the Act?

3. Whether the Commission's "public bodies" definition serves to disqualify governmental agencies (like VDPS) which satisfy the intent of the NRA and is therefore arbitrary and capricious?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the Second Circuit are those in the caption, and, as petitioners: Allegheny Electric Cooperative, Inc., New York City Pubic Utility Service, Upstate Public Utility Services Association, County of Westchester Public Utility Service Agency, James E. O'Neil, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, and Power Authority of the State of New York. New York City Public Utility Service and the County of Westchester Public Utility Service Agency are petitioning this Court separately for a writ of certiorari.

As intervenors: Allegheny Electric Cooperative, Inc., Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric & Gas Corporation, City of Cleveland Ohio, Public Service Electric & Gas Company, City of New York, Port Authority of New York and New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vermont Department of Public Service, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on December 17, 1990, in which rehearing was denied on February 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (1-24a)[1] is reported at 922 F.2d 73. The opinions of the Federal Energy Reg-

[1] The opinion is reprinted in the Appendix to the Petition for Writ of Certiorari. The Appendix is jointly filed by petitioner herein, the Vermont Department of Public Service, and by New York City Public Service and the County of Westchester Public Utility Service Agency which petition separately for review by this Court. Citations to the Appendix are made to the page number therein as "(___ a)". Materials not included in the Appendix appended hereto but which appeared in the Joint Appendix filed in the Court of Appeals shall be referred to as "___ A, Vol. ___". "R. ___" refers to the record below.

ulatory Commission (FERC or Commission) are reported at 48 FERC ¶ 61,124 (1989) (64-109a) and 49 FERC ¶ 61,068 (1989) (110-114a) (Opinion Nos. 329 and 329-A).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Niagara Redevelopment Act, 16 U.S.C. § 836 (116-119a); Section 313 of Federal Power Act, 16 U.S.C. § 8241(b).

STATEMENT OF THE CASE

The Court of Appeals affirmed two FERC orders holding that the State of Vermont's Department of Public Service (Vermont or VDPS) is not a public body within the meaning of the Niagara Redevelopment Act (NRA or Act), 16 U.S.C. § 836 (116-119a), and therefore is no longer eligible to purchase inexpensive hydroelectric "preference power" from the Niagara River Project licensed to the Power Authority of the State of New York (PASNY).[2]

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[2] PASNY is a political subdivision of New York State and is responsible for the hydroelectric development of the Niagara and St. Lawrence Rivers. The NRA authorized and directed the Federal Power Commission, predecessor to the FERC, to issue a license under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, to PASNY for the construction and operation of the Niagara hydroelectric power project, 16 U.S.C. § 836(a) (116a), which license issued in 1957. *Power Authority of the State of New York*, 18 FPC 344 (1957).

The NRA requires that in disposing of 50% of the Niagara project power, PASNY "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance." 16 U.S.C. § 836(b)(1) (116a). Article 21 of the license, in turn, requires that PASNY make up to 20% of the "preference power" available "for use within reasonable economic transmission distance in neighboring States" (*i.e.*, outside New York). *Power Authority of the State of New York*, 18 FPC at 347. It is the allocation of preference power to "neighboring states" that is at issue in this case.

A. VDPS' Historic Reliance on Niagara Power

The Niagara Project went into service in 1961 with almost no takers for the "preference power" reserved by Congress "for the benefit of the people as consumers, particularly domestic and rural consumers". 16 U.S.C. § 836(b)(2) (116-117a). The significant exception was Vermont, which began buying large quantities of preference power in 1962 through the predecessor to the VDPS. *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 99 (2d Cir. 1984) (*PASNY*).

For over 20 years, Vermont's right to preference power was either undisputed, or explicitly recognized, as in *State of Vermont Public Service Board v. PASNY*, 55 FPC 1109, 1113 (1976) (*VPSB*). However, PASNY's long-term contracts for the sale of preference power were set to expire on June 30, 1985. 2878-9A, 2900-1A, Vol. IX. In anticipation of that event, PASNY held hearings during the fall of 1983, resulting in an out-of-state allocation decision in January 1984. 2901A, Vol. IX. On March 26, 1985, the out-of-state preference power contracts, including one with VDPS, were approved by the Trustees. 2901A, Vol. IX.

B. FERC Changes Direction

During the same period, FERC conducted hearings in which challenges were raised to the holding in *VPSB* that VDPS qualified as a public body. Following those hearings, FERC issued Opinion No. 229, reversing a decision by its Administrative Law Judge (ALJ) as well as its earlier holding in *VPSB*.[3] Eschewing a literal reading of the term "public bodies", it found that VDPS was not an NRA

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[3] *Massachusetts Municipal Wholesale Electric Company and Connecticut Municipal Electric Energy Cooperative v. Power Authority*, 30 FERC ¶ 61,323 at 61,651 (1985) (Opinion No. 229), *clarified and reh'g den.*, 32 FERC ¶ 61,194 (1985) (Opinion No. 229-A), *aff'd, Metropolitan Transportation Authority v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (*MTA*).

public body because it was selling preference power to private utilities at wholesale instead of selling directly to customers at retail and therefore could not provide yardstick competition to private utilities as Congress had intended. Opinion No. 229, 30 FERC at 61,651.

Following Opinion No. 229, Vermont enacted legislation ("1985 law") "aimed at satisfying the Commission's newly articulated 'public body' test." 922 F.2d at 78 (8a). The 1985 law empowered VDPS to sell power from the Niagara and St. Lawrence projects at retail and authorized it to lease the use of private utility distribution lines to accomplish that end. *Id.* (8a). VDPS implemented the new statute by entering into agreements with all utilities in Vermont, both public and private. It also acquired an undivided leasehold interest in the various distribution systems and contracted for the furnishing of incidental services such as meter reading and billing by the utilities as independent contractors. *Id.* (8a); Opinion No. 329, 48 FERC at 61,474 (101a). VDPS also sought rehearing of FERC's opinion, urging it to clarify that ownership of distribution facilities was not a prerequisite to achieving public body status.

On rehearing, FERC explained that its reference to ownership was "inadvertent" and that ownership of distribution facilities had never been a requirement to qualify for preference power.[4] Opinion No. 229-A, 32 FERC at

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[4] FERC relied on an earlier ALJ decision, *Town of Massena v. Niagara Mohawk Power Corporation and the Power Authority of the State of New York*, 13 FERC ¶ 63,036 (1980), *complaint withdrawn and decision vacated as moot*, 20 FERC ¶ 61,406 (1982). The *Massena* decision had concluded that neither ownership nor control of distribution facilities was necessary to be engaged in retail distribution of electricity. 13 FERC at 65,147. As discussed, *infra*, FERC's subsequent holding in the case now before this Court that such control *is* necessary to qualify as a public body is a central issue in Vermont's petition.

61,451 n.12. It then left to PASNY, "in the first instance", to determine whether VDPS, under the 1985 law, would qualify as a public body. *Id.*[5]

On June 25, 1985, PASNY included VDPS in the preference power allocations to the seven neighboring states of Vermont, Pennsylvania, Ohio, New Jersey, Massachusetts, Connecticut and Rhode Island. 2903A, Vol. IX.

On June 13, 1986, FERC ordered an evidentiary hearing on complaint filed by the Massachusetts Municipal Wholesale Electric Company (MMWEC) and the Connecticut Municipal Electric Energy Cooperative (CMEEC) challenging PASNY's determination that VDPS was a public body under the 1985 law. *See, Municipal Electric Utilities Assoc. of N.Y. State v. Power Authority of the State of N.Y.*, 35 FERC ¶ 61,333 at 61,758 (1986).[6]

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[5] VDPS was not a petitioner in the *MTA* case and the court held that it was not ruling on whether VDPS would qualify for preference power under the 1985 law. *MTA*, 796 F.2d at 591. The court further held that giving preference power to VDPS, as constituted prior to enactment of the 1985 law, would run counter to the purpose of the NRA. The Court relied on its earlier decision in *PASNY*, 743 F.2d at 105, that the Congressional intent of the NRA preference provision was to promote "yardstick competition":

> . . . [M]unicipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return. Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers. If the "public body" used the preference power itself, the privately-owned utilities would not face any pressure to reduce the prices they charge other customers. Similarly, if the "public body" simply resold the preference power to the privately-owned utilities (as did VDPS) the preference power would not have fostered competition.

MTA, 796 F.2d at 592, citations omitted.

[6] A similar complaint was filed by the Municipal Electric Utility As-

C. FERC Relies on MTA

Following hearings during which the FERC staff witness agreed that VDPS promotes yardstick competition, 254A, 312-13A, Vol. I; 585A, Vol. II, the ALJ found that VDPS is not only "a factor in the electric power industry in the state" (*Municipal Electric Utilities Assoc. of N.Y. State v. Power Authority of the State of N.Y.*, 42 FERC ¶ 63,018 at 65,172 (1988) (*I.D.*) (60a)) but also that, "unlike the [New York] MDAs, it plays a major role in the supply of electric energy." *Id.* at 65,171 (58a). However, the ALJ decided that neither VDPS nor the MDAs were public bodies eligible to receive preference power. *Id.* at 65,173 (63a). In making that finding, the ALJ stated that the use of leasing agreements does not in itself make a public entity ineligible for the receipt of preference power. He continued that a publicly-owned entity can satisfy the "public body" test via lease if it meets certain criteria. *Id.* at 65,164-165 (41-42a).

The ALJ stated that to provide "yardstick competition" the entity must provide both consumers and regulators with a "benchmark" with which to compare the rates and quality of service offered by private utility companies. The ALJ set forth a three step analysis to determine whether an entity provides yardstick competition. To provide yardstick competition a public body must: 1) provide a threat of displacement to private utilities, 2) substantially meet the requirements of its customers, and 3) provide consumers an opportunity for rate comparisons. *Id.* at 65,164

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sociation of New York State (MEUA) against certain municipal distribution agencies (MDAs) in New York. The two complaints were consolidated for hearing in the above cited order. MEUA and CMEEC/MMWEC are associations of public entities that had been receiving preference power. By their complaints, they hoped to reduce the number of entities receiving preference power so that their own allocation of inexpensive preference power would be increased.

(40-41a). VDPS was found to meet only the second of these criteria. *Id.* at 65,171-172 (60a).[7]

Central to the ALJ's decision was his further conclusion, later reiterated and adopted in Opinion No. 329,[8] that in order "to sell and distribute power at retail" as required under Opinion No. 229 (affirmed in *MTA*), a public body would have to possess control of a distribution system "without restraint". *I.D.* at 65,165 (43a); Opinion No. 329, 48 FERC at 61,467 (88a).

With regard to VDPS, the ALJ concluded that it "came closer" than the MDAs to satisfying the "public body" test because it has the ability to provide its service to virtually any resident of Vermont upon request. *I.D.* at 65,171-172 (60a). But, relying principally on his control criterion, he concluded that VDPS, which contracted with private utilities for billing, meter reading, and delivery of the power to VDPS' customers, lacked the requisite control of distribution facilities and distribution costs or direct responsibility to its customers. *I.D.* at 65,172 (60-61a).

In Opinion No. 329, FERC adopted the ALJ's decision in its entirety and disqualified the MDAs and VDPS as "public bodies". Opinion No. 329, 48 FERC at 61,478 (108a). In adopting the ALJ's criteria for a public body, FERC stated that it was merely following, *inter alia*, the Second Circuit's holding in *MTA* that "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, 796 F.2d at 593; *see*, Opinion No. 329, 48 FERC at 61,466 (86a). More specifically, FERC believed itself bound by *MTA* to the control criterion. FERC ruled

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[7] The ALJ took official notice of, but then declined to consider a 1987 Vermont statute (30 V.S.A. § 211, *et seq.*), that, *inter alia*, mandated rate comparisons on customer bills. *I.D.* at 65,170 (57a); Opinion No. 329, 48 FERC at 61,472 n.57 (96-97a).

[8] 48 FERC at 61,467 (88a).

that, as it read *MTA*, the Second Circuit's interpretation of the legislative history of the NRA "*requires* that the 'public body' *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a) (emphasis added).

On rehearing, VDPS argued, *inter alia*, that despite explicitly relying on *MTA*, FERC had disregarded the Second Circuit's express holding that a regulatory yardstick is a form of yardstick competition (*MTA*, 796 F.2d at 592) when it ruled that the regulatory yardstick VDPS provided would not establish the existence of yardstick competition. *See*, Opinion No. 329, 48 FERC at 61,467 (88a).

As to FERC's requirement that a public body obtain operational control of distribution facilities "without restraint" in order to insure "continuity of service," *see*, 922 F.2d 79 (10a), VDPS pointed out that FERC's position was not mandated by the *MTA* decision and further made no sense in light of the fact that control of generation and transmission services, which are both equally necessary for continuity of service, was not required. VDPS also argued that the required level of control was tantamount to the ownership criterion that the Commission claimed to reject. Access to, and use of distribution facilities, not operational control, is all that is necessary to render the public body capable of supplying the power directly to the customers it undertakes to serve. VDPS finally argued that the Commission ignored extensive evidence that retail suppliers of power, like those of gas and telecommunication services, can and do provide service to ultimate consumers by relying on distribution facilities under the operational control of their competitors.

The Commission denied Vermont's request for rehearing without discussion by order dated October 19, 1989. Opinion No. 329-A, 49 FERC ¶ 61,068 (1989) (110-114a).

D. The Second Circuit Defers to FERC

The Court of Appeals issued its decision upholding Order Nos. 329 and 329-A on December 17, 1990. *See, Allegheny*

Electric Cooperative, Inc. v. FERC, 922 F.2d 73 (2d Cir. 1990) (1-24a). The court found VDPS and the other petitioners below correct in noting that the NRA itself does not impose "the strict standards" adopted and that prior case law, including *MTA*, had not expressly imposed those eligibility criteria either. 922 F.2d at 81 (14a). However, the court deferred to FERC, although noting that it might not have adopted "these exact criteria." *Id.* at 82 (16a). The court did not address Vermont's argument that because FERC erroneously believed its control criterion was *mandated* by the *MTA* case, the agency had not exercised its own discretion and that deference to FERC's decision therefore was not appropriate. Instead, relying heavily on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), the court held that unless FERC's interpretation is inconsistent with the plain language of the statute, or with the intent of Congress, it would defer to the Commission's construction as long as it was "reasonable". *Id.* at 80, 81, 82 (12, 14, 16a).

Applying *Chevron*, the court then found Vermont's and other petitioners' arguments that through their leasing arrangements they possess the capability to distribute power at retail, thus satisfying the definition of "public body" adopted in *MTA*, unavailing. It also rejected the contention that the Commission misapplied the principle of "yardstick competition." In affirming FERC's ruling that public bodies could not provide yardstick competition unless they maintained separate control of distribution costs, *id.* at 85 (21a), the Court rejected Vermont's argument that FERC's test effectively mandates the distribution facilities ownership requirement the agency had itself claimed to eschew.

REASONS FOR GRANTING THE PETITION

A. The Issue Is Important

The Court of Appeals' decision deferring to FERC's definition of "public bodies" under the NRA misconstrues, in three respects, the obligation of a reviewing court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Department of Treasury, I.R.S. v. Federal Labor Relations Authority*, 110 S.Ct. 1623, 1629-30 (1990). First, the court ignored the fact that FERC relied not on its own analysis of the NRA, but on an incorrect reading of the Second Circuit's interpretation of the Act in *MTA* and is therefore not entitled to deference. Second, assuming any deference to the statutory construction of an administrative agency was due in this case, the court incorrectly assumed that deference was due FERC, the reviewing agency, rather than PASNY, the licensee under act of Congress charged with administering the NRA's preference provisions. *See*, 16 U.S.C. § 836(b)(1) (116a). Third, it erred in applying full deference to an agency whose interpretation of the statute has changed several times. Given the development of the law under *Chevron*, including the recent decision in *Secretary of Labor v. Occupational Safety and Health Review Commission*, No. 89-1541, 59 U.S.L.W. 4197 (March 20, 1991) (*OSHRC*), these issues are worthy of the Court's consideration.

B. There Is A Conflict Among the Courts of Appeals

In several recent cases, the Court of Appeals for the District of Columbia Circuit has held that where an agency mistakenly believes its construction of a statute is mandated by prior cases, it has not exercised its discretion and therefore is not entitled to deference under *Chevron*. *See, Phillips Petroleum Corp. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986); *Prill v. NLRB*, 755 F.2d 941, 956-58 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985). Here, FERC believed its requirement that "public bodies" con-

trol distribution facilities was mandated by an earlier decision of the Second Circuit. Then, the Second Circuit held that FERC's definition was not mandated by the statute or prior case law, but deferred to the agency anyway. By deferring to FERC, the court adopted an approach entirely at odds with that of the D.C. Circuit.

C. The Erroneous Decision Below Will Have Broad Precedential Ramifications

The Court of Appeals erred in two other respects. First, even assuming FERC's decision had been based on its own interpretation of the NRA, its holding that the State of Vermont's Department of Public Service is not a "public body" strayed so far from the plain text of the Act, the decisions of the licensee, *PASNY*, FERC's prior decisions, and the court's own prior interpretation of the Act's clear purpose that the court's decision to grant deference was once again an abdication of its obligation to review. Second, the court erred in affirming FERC's determination that a public body must control distribution facilities without a showing from the agency that such a requirement was either necessary to carry out, or consistent with, the intent of the Act.

If allowed to stand, the decision will unlawfully deprive the State of Vermont, after almost three decades of reliance, of its statutory entitlement to cheap hydroelectric preference power at a cost to its electric consumers of more than $10 million annually. Moreover, the impact of this decision will not be confined to the parties to this case. Beyond the *Chevron* issues, there are a number of federal laws establishing preferences to cheap hydropower for states, municipalities and other public bodies.[9] A di-

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[9] *See, e.g.*, Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d)(c); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i); Bonneville Project Act of 1937, 16 U.S.C. § 832c; Reclamation Project Act of 1939, 43 U.S.C. § 620c; Flood Control Act of 1944, 16 U.S.C. 825s. The

vided panel decision of the Tenth Circuit—to which a number of national organizations were parties or amici—recently upheld an agency determination that the preference for "municipalities" under the Reclamation Act of 1939 extends only to municipalities which maintain "utility responsibility." *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991) (*Salt Lake City*)[10] In these circumstances the Court of Appeals' decision not only contravenes *Chevron*, but would have substantial precedential impact. Therefore, review by this Court is warranted.

ARGUMENT

I. *CHEVRON* IS INAPPLICABLE WHERE THE AGENCY HAS NOT EXERCISED ITS OWN DISCRETION BUT MERELY HAS FOLLOWED AN ERRONEOUS BELIEF THAT IT WAS BOUND BY A PRIOR COURT DECISION.

Under *Chevron*, an agency charged with administering an ambiguous statute is entitled to deference from a reviewing court where, in the exercise of its discretion, the agency interprets the statute reasonably. In this case, the court relied heavily on *Chevron*, but did so incorrectly. First, FERC never exercised its discretion, erroneously believing its application of the NRA was mandated by a prior decision of the Second Circuit—*MTA*. Thus, *Chevron* is inapplicable. Second, assuming *Chevron* is applicable at all, it is not FERC that has the initial responsibility under the NRA to determine what entities qualify for preference power. That role is PASNY's and PASNY determined that

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Second Circuit has held that the NRA, like the other preference laws cited, establishes "the usual federal preference." *PASNY*, 743 F.2d 93, 105. Accord, *MTA*, 796 F.2d at 592, n.7.

[10] In that case, the majority ruled that the agency (Western Area Power Administration or WAPA) was entitled to deference under *Chevron*. Judge Taha, dissenting, maintained that WAPA's requirement was inconsistent with the plain language of the Act. *Salt Lake City*, 926 F.2d at 985.

VDPS is a public body. Under *OHSRC, supra*, PASNY was entitled to deference, not FERC. Third, assuming any deference was due FERC under *Chevron*, because FERC's result conflicted with its precedent, it was entitled to considerably less deference than accorded by the Court of Appeals. *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446, n.30, 107 S.Ct. 1207, 1221 n.30 (1987) (*Cardoza*).

A. FERC's Reliance on MTA Prohibits Chevron Deference

The key determinant of public body status under FERC Opinion No. 329 is whether the public entity has complete operational control of distribution facilities. Opinion No. 329, 48 FERC at 61,467 (88a). FERC found this criterion to have originated in the Second Circuit's *MTA* decision. *MTA*, FERC stated, "*requires* that the public body *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a) (emphasis added). Since FERC found that VDPS did not control distribution facilities, as it believed was required by *MTA*, it denied VDPS public body status. FERC's stated basis for its control criterion (and its other stated criteria as well) however, is clearly erroneous. As the Second Circuit held below, "the statute itself does not impose these strict standards and . . . prior case law has not expressly imposed such eligibility criteria." 922 F.2d at 81 (14a).

"[T]he validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination." *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 632 n.31 (1980) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)). Where the agency has been proceeding on a "mistaken assumption" about the statute, it is not for the reviewing court to supply a justification "on the agency's behalf." *Dept. of Treasury v. FLRA*, 110 S.Ct. at 1629-30 (1990). In this case, the agency's determination rests on a demonstrably faulty premise. It cannot be de-

termined from the order whether, unencumbered by its erroneous view of the law, FERC would have reached the same decision or a different one. A reviewing court, therefore, "is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). *See also, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).

The D.C. Circuit Court has addressed the applicability of *Chevron* in such circumstances.[11] Relying on *Chenery*, the D.C. Circuit has on three occasions ruled that *Chevron* is inapplicable. *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986) (*Phillips*); *Prill v. NLRB*, 755 F.2d 941, 956-58 (D.C. Cir.), *cert. denied*, 106 U.S. 313 (1985); *International Brotherhood of Electrical Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987). Deference under *Chevron*, the D.C. Circuit has soundly reasoned, "is only appropriate when the agency has exercised its *own* judgment. When instead, the agency's decision is based on an erroneous view of the law, its decision cannot stand." *Phillips*, 792 F.2d at 1169 (emphasis in original). What is critical is that here, as in the cited cases, the agency wrongly believed itself "bound" by prior court decisions, and that its statutory interpretation was "mandated" by them. *Phillips*, 792 F.2d at 1172. Thus, even where (as here) the agency offers additional explanation for its action, the outcome, assuming it might otherwise be sustainable,[12] is clearly tainted:

> [T]he result in a given case will often turn not only on the governing standard but also on the manner in which it is applied, and this may well

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[11] While squarely presented below, the Second Circuit did not rule on the issue.

[12] Even where *Chevron* applies, the agency's interpretation must be a reasonable one. As shown, *infra*, Section III, FERC's order fails that test.

> be influenced by whether the Board believes the standard to be dictated by the statute itself or rather adopted as a matter of policy in order to effectuate the purposes of the Act. Thus, we cannot say that the Board's error in this case has no bearing on the result reached.

Prill v. NLRB, 755 F.2d at 956-957.

The principle of deference rests on the assumption that Congress, in creating an agency and entrusting it to administer a statutory scheme, has directed the courts, implicitly or explicitly, to give weight to the agency's presumed expertise. Sunstein, *Law and Administration After Chevron*, 90 Col. L.R. 2071, 2084-91 (1990). And in this case the court below, relying on FERC's "experience and expertise", deferred to FERC. 922 F.2d at 81 (14a). The lower court's error is that the agency *itself* did not rely on its own "experience or expertise", or even undertake to interpret the statute. The result is that VDPS has been met with a circle of deference in which FERC concludes that its actions are compelled by prior decisions of the Second Circuit, the Second Circuit disagrees, but nonetheless concludes that affirmance is compelled under *Chevron*.

B. Deference, If Any, Belonged To PASNY, Not FERC

Under the NRA, FERC does not make any initial determination as to eligibility for preference power. That role is PASNY's, the licensee. "We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA." Opinion No. 229-A, 32 FERC at 61,451. In fact, FERC's role under the NRA is quite limited. Beyond its obligation to issue the license to PASNY, 16 U.S.C. § 836(a) (116a), FERC's only specific role under the NRA is to "determine and fix the applicable

portion of power to be made available and the terms applicable thereto" in the event of disagreement between the licensee and the power-marketing agencies of states neighboring New York. 16 U.S.C. § 836(b)(2) (117a).

Assuming, *arguendo*, that this task properly encompasses a review of PASNY decisions as to which entities are NRA public bodies, it is clear that FERC's role is not that of an initial fact finder. Rather, FERC's role is to review the decisions of PASNY in the event of dispute. This fact situation is similar to that presented to the Court in *OHSRC*. There, the Secretary of Labor was charged with responsibility for setting and enforcing workplace health and safety standards. In contrast, the Occupational Safety and Health Review Commission was assigned adjudicatory functions. Under such a "split enforcement" structure, this Court held that it was the decision of the Secretary that was entitled to deference (if it is reasonable) and that a reviewing court may not prefer the reasonable interpretation of the Commission to the reasonable interpretation of the Secretary. *OHSRC*, 58 U.S.L.W. at 4200-1.

The NRA's split enforcement approach obviously is not identical to that considered in *OHSRC*. However, the distinctions are insignificant to the question of deference. Consistent with *OHSRC*, the Court is requested to find that the Second Circuit erred in according FERC's decision *Chevron* deference.

C. Assuming Deference Was Due FERC's Analysis, Such Deference Should Have been Lessened Because Of FERC's Change Of View

Assuming any deference to FERC was due, the Second Circuit's accord of full deference to FERC ignored one vital fact: FERC had changed the standards under which PASNY had allocated preference power to VDPS for over

20 years with FERC's blessing. The court's error in this regard was fully explained in *Cardoza*:

> An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed. 2d 80 (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411-412, 50 L.Ed.2d 343 (1976).

Cardoza, supra, 480 U.S. at 446, n.30.

Here, the shifting definitions are pronounced. In 1976, in *VPSB*, FERC explicitly held that VDPS was a "public body" entitled to the preference power which it sold to private utilities, because it ensured that "all direct benefits of that power accrue to residential and rural customers within Vermont by means of PSB [Public Service Board] supervision over rates." 55 FPC at 1116. In Opinion No. 229, FERC reversed itself, necessitating changes in Vermont law to bring VDPS into compliance with the new standards prohibiting resale to private utilities. In Opinion No. 329, affirmed below, FERC added still further hurdles for VDPS. This is precisely the "inconsistency of positions" discussed in *Cardoza* and prohibits the extent of deference shown FERC by the Second Circuit.

II. EVEN ASSUMING *CHEVRON* WERE APPLICABLE, FERC'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE AND CLEAR INTENT OF THE STATUTE.

The lower court held that under *Chevron*, "[u]nless the Commission's interpretation is inconsistent with the plain language of the statute or with the intent of Congress,

we will defer to the Commission's construction as long as it is 'reasonable' ". 922 F.2d at 81 (14a). The FERC decision affirmed below, however, strays impermissibly from both "the plain language of the statute" and the "intent of Congress." FERC's failure to exercise its own judgment aside, its action creates an artificial standard which denies public body status to public entities such as VDPS which fall within both the plain language and the intent of the NRA.

Chevron, where applicable, involves a two step analysis. The court must first look to the plain meaning of the statute. Only if it determines that the statute's intent on the question presented is ambiguous does the court reach the second step of the analysis, *i.e.*, a determination whether the agency's construction is reasonable and therefore entitled to deference. *Chevron*, 467 U.S. at 842. Whether the statute is unambiguous can itself be ascertained in one of two ways. The primary source is, of course, the statute itself. If the language is plain, that normally will be the end of the inquiry, "for the Court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Invoking "traditional rules of statutory interpretation" the court also can look to settled judicial constructions of a statute to establish its clear purpose: "Once we have determined a statute's clear meaning we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2768 (1990).

The Second Circuit's conclusion that FERC's definition of public body is consistent with the plain language and intent of the NRA cannot be sustained. As to the asserted consistency with the "language and purpose" of the statute (922 F.2d at 80, 81 (13, 14a)), "[t]he trouble with this argument is that it is entirely disconnected from the text

of the statute." *Dept. of Treasury v. FLRA*, 110 S.Ct. at 1628. The lower court's ruling upholds FERC's determination that the State of Vermont is not a public body, but the "text of the statute" surely suggests otherwise. The NRA provides in relevant part simply that "to ensure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly rural and domestic customers . . . . and to encourage the widest possible use, the licensee . . . shall give preference and priority to public bodies . . . ." 16 U.S.C. § 836(b)(1) (116a). The requirement that "public bodies" control the operation of distribution facilities is neither expressed in nor implied from the words of the statute.[13]

Reliance on the NRA's intent as justification for FERC's control criterion is no more defensible. The "crystal clear" intent of the NRA, the Second Circuit previously has held, is to promote "yardstick competition" between public bodies and private utilities. *MTA*, 796 F.2d at 593. Public entities which consume power as end users, or which sell their power to private utilities at wholesale rather than "for resale to customers at retail," the Court further elaborated, could not provide yardstick competition. *MTA*, 796

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[13] Construing Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 620c, a somewhat similar provision governing preference in the sale of federal hydropower, the Tenth Circuit affirmed a lower court holding that the Western Area Power Administration (WAPA), the agency charged with administering the statute, was entitled to deference in its determination that "municipalities" would only be eligible for preference power if they assumed "utility responsibility." *Salt Lake City*, 926 F.2d at 978-979. Dissenting, Judge Taha concluded that the plain language of the Act could not sustain WAPA's interpretation:

> In my view, the Congressional intent expressed in the plain language of section 9(c) is to provide preference to municipalities simply based on their status as political subdivisions, not on their capacity to distribute power.

Id. at 985.

F.2d at 593. Congress' hope, the lower court has stated, was that public bodies:

> would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

MTA, 796 F.2d at 592.

It would seem obvious then that under a "clear purpose" test, governmental agencies which purchase "hydropower from [PASNY] for resale to customers at retail" (*MTA*, 796 F.2d at 593) and which "by using their supply of hydropower to charge rates which would . . . at least serve as a measure by which regulators could set the private utilities' rate of return" (*id.* at 592), would be eligible for preference power under the NRA. VDPS meets that test. The Commission did not dispute that the retail rates of VDPS are on file with and regulated by the Vermont Public Service Board (Opinion No. 329, 48 FERC at 61,473-74 (98a)), yet it found that the "appropriate ways to promote competition at retail between public utilities and IOUs" include consumer rate comparisons, but—contrary to *MTA—not* " 'regulatory' comparisons." Opinion No. 329, 48 FERC at 61,467 (88a).

In upholding the Commission's public body criteria on the basis that such criteria are consistent with the purpose of the NRA, the lower court has strained to find deference where none is due. "But deference is not abdication, and it requires [a court] to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian American Oil Co.*, 59 U.S.L.W. 4225, 4230 (1991) (Scalia, J., concurring). One such principle is that "[t]he plain purpose of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors of the Federal Reserve System v. Di-*

mension Finance Corporation, 474 U.S. 364, 373 (1986), *citing, Richards v. United States*, 369 U.S. 1, 9 (1962). In *MTA* the lower court had already gone beyond the language of the statute to determine its "plain purpose" and found that purpose achieved where—as in Vermont—the public entity provides a regulatory yardstick to private competitors. Attempts to discern the "plain purpose of legislation at the expense of the terms of the statute itself" are dubious to begin with, *Board of Governors*, 474 U.S. at 374,[14] but, rightly or wrongly, the lower court's prior determination of statutory purpose in *MTA* is to be honored on the basis of *stare decisis*. *Maislin, supra*, 110 S.Ct. at 2768. Here, however, the lower court has upheld a statutory construction twice removed from the text. It has affirmed an agency-generated requirement—the control criterion (erroneously assumed by FERC to be mandated under *MTA*)—that acts to disqualify public entities which satisfy the lower court's own regulatory yardstick test under *MTA*. The resulting interpretation of the statute now in effect is so far removed. from its actual language as to render it unrecognizable.

Reduced to its essentials, the decision of the FERC affirmed below looks beyond the language of the statute, "public bodies", and looks beyond the historic definitions of "yardstick competition" and develops new control criteria in a misguided effort to fill in a newly found gap in the statute. But this approach unlawfully extends the statute, a subject addressed in *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944) (*Addison*):

> Legislation introducing a new system is at best empirical, and not infrequently administration re-

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[14] "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.*

> veals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

In brief, even assuming that FERC actually has discovered a pragmatic need to redefine either "public bodies" or "yardstick competition", a subject discussed *infra*, the court should not have shown deference to FERC's extension of the statute. It should have reversed FERC, suggesting that it seek legislation to fill in the gaps perceived in the statute.

III. FERC'S CONTROL CRITERION IS NOT THE PRODUCT OF REASONED DECISIONMAKING.

Although the court below found that FERC's public body criteria were not required by the NRA or prior case law, it stated that the agency was not precluded "from adopting standards that it deems essential to effective implementation of the statute it has been directed to administer." 922 F.2d at 81 (14a). FERC, however, never demonstrated that the control criterion it chose was essential or even rationally connected to the administration of the NRA, as the process of reasoned decisionmaking requires. *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Insurance Company*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866 (1983) (*State Farm*).

FERC adopted several public body criteria, three of which are of principal relevance: (1) the ability to serve a substantial portion of the public body's customers' requirements, (2) the ability to foster consumer rate comparisons and (3) operational control of distribution facilities. As to the first, FERC found that Vermont, "unlike the MDAs", met it. *I.D.*, 42 FERC at 65,171 (58a); Opinion No. 329, 48 FERC at 61,472 (96a). Similarly, a 1987 Vermont statute mandating the conspicuous and separate display of

Vermont's retail rates and charges on customer bills[15] (of which FERC took official notice, but arbitrarily refused to consider) satisfies the second criteria.[16] Vermont's argument, therefore centers on the Commission's control criterion.[17]

In its discussion of VDPS, the lower court emphasized the absence of competition between the distribution costs of VDPS and the lessor utilities as the "most compelling" rationale cited by FERC for the imposition of an operational control requirement. 922 F.2d at 85 (21a). Indeed, the court went so far as to suggest that "spurring competition" would be nearly inconceivable in the absence of differing distribution costs. *Id.*[18] That holding, even under

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[15] 30 V.S.A. § 212f (1987).

[16] PASNY's contract with Vermont allows the State to reapply for an allocation of preference power under a 1987 Vermont statute (30 V.S.A. § 211 *et seq.*) if, as a result of the resolution of this case by FERC or the courts, Vermont could qualify as a public body under that statute.

[17] Control and direct responsibility, although nominally listed as separate criteria, are treated in the Commission's order and the lower court's opinion interchangeably. The direct responsibility criterion appears to derive from FERC's interpretation of the Second Circuit's statement in *MTA* that a public body could not supply customers indirectly, *i.e.*, at wholesale, but had to be "directly responsible" for meeting their needs. *MTA*, 796 F.2d at 593 (citing Opinion No. 229). In turn, FERC concluded that to be directly responsible *MTA* requires control of distribution facilities. Vermont refers to both control and direct responsibility with the shorthand "control criterion".

[18] As the court held:

> Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the object of the NRA, it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective.

922 F.2d at 85 (21a).

a deferential standard of review (which is not warranted here), is seriously flawed.

First, the distribution cost test finds no support in the words of the NRA, the legislative history or case law. Although the lower court concluded in *this* case that no competition is possible if the public body and the private utility have the same *distribution* costs (922 F.2d 85 (21a)), the assumption underlying the yardstick principle—first laid out in the earlier *PASNY* decision and expressly referenced by the court—is simply that the public body's "lower competitive *rates*," fueled by "cheap *hydropower*" costs, "will force the private utilities in turn to reduce their *rates*." 922 F.2d at 77 (6-7a) (quoting *PASNY*, 743 F.2d at 105 (emphasis added)). This assumption makes perfect sense even if "the distribution costs of the lessee public entity and the lessor private utility will always be the same." *Id.* at 85 (21a). If distribution costs are equal, public bodies can assuredly translate their "cheap hydropower" into "lower competitive rates." *Id.* at 77 (6a). Those lower rates, in turn, will pressure private utilities to lower their rates. Yardstick competition comes from a comparison of *rates*, not the individual cost components thereof. Indeed, the Commission's determination that a public body can lease the distribution facilities of a private utility (Opinion No. 329, 48 FERC at 61,467 (88a)) and thereby incur most of the same distribution costs, would seem to be a tacit acknowledgement of this point.

Second, if VDPS' leases are defective under the "distribution cost" test, *every* lease will suffer from this defect. Simply put, no private utility could be compelled to lease its facilities at less than cost. And, since the bulk of the lessee's distribution costs will be the costs of the leased facilities (as opposed to the operating costs), there logically would be little difference in the public body's distribution costs, whether it, or the private utility physically operated

those facilities.[19] The FERC test affirmed below would lead to the anomalous result that if VDPS took over operation of the private utilities' distribution systems and incurred *higher* distribution costs in the process—it would qualify as a public body even if, as a result, its rates were *less* competitive. Far from comprising the "most compelling argument against the [VDPS] form of leasing arrangement" (*Id.* at 85 (21a)), the distribution cost test lacks any logical basis.

Third, the lower court's conclusion that competition between public entities and private utilities is not possible unless the public entity controls the operation of a distribution system (in order to control distribution costs) cannot be squared with the lower court's heavy reliance on FERC's purported expertise (*Id.* at 81 (14a)), particularly since FERC itself has reached the opposite conclusion. In a recent FERC case cited to the lower court, VDPS opposed a merger of two private utilities in Vermont on the grounds that the merger was anticompetitive. FERC overruled VDPS' objections, citing VDPS' continuing presence as a retail competitor of those utilities *against VDPS* as a factor supporting FERC's conclusion that the merger was *not* anticompetitive.[20] And, in the case at bar, the

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[19] The lower court and FERC also referred to the fact that VDPS has contracted with private utilities to perform a number of distribution operations typically undertaken by the local utility. 922 F.2d at 84-85 (20-21a). But public bodies, even as FERC defines the term, commonly retain third parties to perform typical distribution operations like meter reading, billing, tree trimming, *etc.* 2609-11A, Vol. IX.

[20] See *Central Vermont Public Service Corporation and Allied Power and Light Company*, 52 FERC ¶ 61,278 at 62,103 (1990). Subsequent to the Commission's order in the *Central Vermont* case, the intervenors in the case below sought to intervene out-of-time in that case—not to take any substantive position on the merger—but solely to urge that FERC "clarify", *i.e.*, retract its finding that VDPS sells power at retail in competition with private utilities. Tellingly, despite the intervenors' invitation, the Commission did not disavow its holding in the first

Commission staff's only witness testified that VDPS provided competition to private utilities at retail for the same reasons given by VDPS' own economic experts. 254A, 312-3A, Vol. I; 585A, Vol. II.

Fourth, the control criterion is itself subject to a number of irreconcilable conflicts that render its application uneven and arbitrary. For example, although FERC states that a public body cannot control distribution facilities if it shares responsibility with a private utility for serving a customer, Opinion No. 329, 48 FERC at 61,467 (89a), it allows industrial customers of a public body, without limit, to take service from "more than one supplier", Opinion No. 329, 48 FERC at 61,467 (89a), thereby both precluding and permitting shared responsibility under the same criterion. Similarly, it requires the public body to control the distribution facilities used to serve its customers, but it excludes "borderline agreements" by a public body—agreements under which the customers of the public body are physically served by distribution facilities controlled by another entity—from the control criterion. Opinion No. 329, 48 FERC at 61,467, 61,468 (88, 89a). Again, it places no limit on the number of public body customers who could be served under such borderline agreements. Nor does FERC ever reconcile why its control criterion applies only to distribution facilities. The Commission's justification for

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Central Vermont case that VDPS is a retail competitor of private utilities in Vermont. Nor could it do so without undercutting its conclusion that the merger was not anticompetitive. Indeed, FERC *reiterated* in the second *Central Vermont* case, that "[VDPS'] role in the market in the State of Vermont was a relevant consideration in examining the impacts of the proposed merger between Central Vermont and Allied." *Central Vermont Public Service Corporation and Allied Power and Light Company*, 53 FERC ¶ 61,204 at 61,818 (1990). Although the Commission purported to issue a "clarification" that VDPS is a "broker acting in the wholesale and retail markets in Vermont", this was no clarification at all. Rather, the Commission's "clarifying" language was transparently intended to obfuscate the contradiction between the two cases without having to disavow conclusions made in either of them.

the criterion,—that such control is necessary to assure "continuity of service"[21]—applies equally to generation and transmission facilities. An interruption in service from any of these facilities would disrupt service continuity.

Fifth, in finding FERC's control rationale "compelling", both FERC and the lower court entirely overlooked the fact that competition in the *sale* of power at retail—like competition in the sale of any product at retail—does not require control over the physical delivery of the product. In the proceedings below, the example was given of the mail order house that relies on UPS to deliver its products to retail customers. 2832-33A, Vol. IX. Indeed, VDPS pointed out that the operational control criterion turns the notion of competition on its head. Under the antitrust laws, for example, an entity is not required to duplicate or condemn essential facilities controlled by its competitor. On the contrary, in the analogous telecommunications context, the refusal by a private utility to provide access to its essential "distribution facilities" has been held to be anticompetitive where the utility "had *complete control* over the local distribution facilities that [its competitor] required." *See, MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (emphasis added).

FERC also has recognized that, in the similarly analogous context of the natural gas industry, competition in the sale of gas is made possible precisely because natural gas pipeline companies—which sell *and* deliver natural gas—have been required to deliver gas sold by their competitors as well. *See, Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468 (1988). And, in the electric utility industry, FERC has recognized that a power supplier does not need to own or operate facilities in order to compete in the sale of electric

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[21] 922 F.2d at 79 (10a) (citing *I.D.*, 42 FERC at 65,165 (44a)).

energy to which it takes title. *Citizens Power & Light Corporation*, 48 FERC ¶ 61,210 at 61,776 (1989). These arguments—and evidence supporting them (*e.g.*, 151A, 254A, 278A, 313A, Vol. I; 558-561A, 576-583A, Vol. II; 2783-2785A, 2811-2824A, Vol. IX)—were squarely presented to FERC (and the lower court), but never mentioned, let alone given reasoned consideration, by the ALJ or FERC in their decisions, as reasoned decisionmaking requires. *State Farm*, 463 U.S. 29, 43 (1983); *Maryland People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985); *Moraine Pipeline Company v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990).

CONCLUSION

For the reasons set forth herein, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, and upon review of the Record in that court, its judgment be reversed and the cause remanded to it with directions that it reverse the orders of the Federal Energy Regulatory Commission.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND THE RHODE ISLAND PUBLIC UTILITIES COMMISSION,
Cross Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Cross Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court below acted properly in affirming the Federal Energy Regulatory Commission's determination of the criteria which must be met in order to be a "public body" under the Niagara Redevelopment Act and its determination that petitioners did not qualify to purchase Niagara Redevelopment Act preference power?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

NEW YORK CITY PUBLIC UTILITY SERVICE, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondents Allegheny Electric Cooperative, Inc. ("Allegheny"), the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), the Municipal Electric Utilities Association of New York State ("MEUA") and the Public Power Association of New Jersey ("PPANJ") (collectively referred to herein as "Public Systems"), all intervenors in the court below,

respectfully pray that the Court deny the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949.

STATEMENT OF THE CASE

This case presents for consideration the third recent and related appeal of a Federal Energy Regulatory Commission ("FERC" or "Commission") decision concerning the allocation of Niagara Project hydroelectric power under the Niagara Redevelopment Act, 16 U.S.C. § 836 *et seq.* ("NRA").[1] Less than five years ago, this Court denied multiple petitions for writs of certiorari in *MTA*. The petitions filed here present nothing that has not previously been submitted to this Court. They should also be denied.

The Court's evaluation of the petitions will be greatly aided by a brief overview of the NRA and recent litigation concerning its meaning. The NRA directed the Federal Power Commission (now the FERC) to issue a license to the Power Authority of the State of New York ("PASNY") under Part I of the Federal Power Act, 16 U.S.C. § 791 *et seq.* The license permitted PASNY to construct and operate a hydroelectric power project on the Niagara River, between New York and Canada.

The NRA also directed the Commission to include a "preference" clause in the license, which states that:

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[1] The other two cases are: *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*") and *Metropolitan Transp. Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Elec. Coop., Inc. v.* FERC, 479 U.S. 1085 (1987) ("*MTA*").

> [T]he licensee in disposing of 50 per centum of the project power *shall give preference and priority to public bodies* and nonprofit cooperatives within economic transmission distance.

16 U.S.C. § 836(b)(1) (emphasis added). This clause, the meaning of which was litigated in *PASNY* and *MTA*, was explained in the opinion under consideration here:

> The fifty percent of Niagara Project power set aside for "public bodies and nonprofit cooperatives" is referred to as preference power. Those entities eligible to receive an allocation of this preference power are called preference customers. To be a "preference customer", an entity first must qualify as a "public body".

Allegheny Electric Cooperative, Inc. v. FERC, 922 F.2d 73, 76-77 (2d Cir. 1990) ("*Allegheny v. FERC*"), P.A. at 5-6.[2] The three petitioners and the cross-petitioner herein all claim that they are NRA "public bodies," and are thereby entitled to preference power allocations.

A. *Prior Cases.* Litigation over the NRA's phrase "public bodies" began several years ago. In the 1984 *PASNY* decision, the Second Circuit affirmed the Commission's determination that an NRA "public body" must, *inter alia*, be the type of entity which fosters "yardstick competition," described in its sim-

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[2] References to the decisions of the Commission and the court below included in the "Appendix to Petitions For Writ of Certiorari" are designated as "P.A.".

plest form as competition by example. *PASNY*, 743 F.2d at 105. The FERC and the court also ruled that NRA "public bodies" are only those publicly-owned entities that sell and distribute preference power directly to consumers. *MEUA v. PASNY*, Opinion No. 151, 21 FERC (CCH) ¶ 61,021 at pp. 61,105-11, 61,129 (1982). In affirming the Commission, the Second Circuit conducted its own analysis of the NRA's legislative history, and also accorded " 'great deference' " to the Commission's conclusions, because they came from the "agency charged with [the NRA's] administration." *PASNY*, 743 F.2d at 103, 105 (citations omitted).

In *MTA*, the FERC and the Second Circuit considered whether New York's Metropolitan Transportation Authority ("MTA") and the Vermont Department of Public Service ("VDPS") were "public bodies." The FERC concluded that the MTA and VDPS were not NRA "public bodies," because neither was capable of selling and distributing power directly to consumers at retail. *MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC (CCH) ¶ 61,323, at p. 61,651 (1985). The Second Circuit again affirmed the FERC's determinations. *MTA*, 796 F.2d at 590, *quoting* Opinion No. 229, 30 FERC at 61,651. In so concluding, the court again reviewed the NRA's legislative history, stating:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that is what Congress intended the term to mean.

Id. at 591. This Court then denied two petitions for writs of certiorari and a cross-petition filed by the State of Rhode Island. 479 U.S. 1085 (1987).[3] But for the change in certain parties, *MTA* might well be said to collaterally estop relitigation of the issues presented by petitioners here.

B. *The Present Case.* This case stems from PASNY's 1985 decision to allocate preference power to numerous so-called "Municipal Distribution Agencies" ("MDAs"),[4] including petitioners County of Westchester Public Utility Service Agency ("COWPUSA") and New York City Public Utility Service ("NYCPUS"), and to the revised VDPS.[5] Both the MDAs

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[3] Two of the petitions, filed by the MTA, No. 86-736, and by the State of Rhode Island, No. 86-942, challenged FERC's ruling on the nature of the NRA's "preference" clause and the definition of the term "public bodies". Rhode Island's 1986 cross-petition raised many of the issues raised again here. Petitioner Allegheny sought review only of the FERC's interpretation of the NRA term "neighboring states."

The State of Rhode Island's current cross-petition is similar in at least one respect to its 1986 cross-petition: it is based on an exceedingly limited participation in the case at the Commission. Rhode Island did not seek to participate in the hearing underlying Opinion No. 329, and was only granted intervention in that decision itself. P.A. at 68-69.

[4] The term "MDA" refers to paper agencies created in counties and cities in New York State, with the unusual assistance of New York's investor-owned utilities, the MDAs' alleged competitors, to serve as conduits for the delivery of NRA preference power to customers of investor-owned utilities.

[5] As explained in *Allegheny v. FERC* (P.A. at 8), following the issuance of Opinion No. 229, VDPS was the subject of state legislation "aimed at satisfying the Commission's 'public body' definition" in *MTA* and *PASNY*.

and VDPS sought to satisfy the NRA "public body" criteria of *MTA* and *PASNY* by entering into arrangements under which petitioners purported to serve "their" customers by purporting to "lease" electric distribution facilities from allegedly competing local investor-owned utilities. These leases provided that the private utilities would continue to perform all distribution and billing functions. Public Systems challenged PASNY's allocation decisions at FERC, contending that neither the MDAs nor VDPS constituted "public bodies."

In *MEUA v. PASNY*, Opinion No. 329, 48 FERC (CCH) ¶ 61,124 (1989), the Commission explained that the MDA and VDPS "lease" arrangements had several pertinent common features. In the case of the MDAs, the Commission found that the investor-owned utility "lessor":

> (1) . . . retains the franchise responsibility to supply the full requirements of its customers for electric service; (2) the IOU [investor-owned utility] remains responsible to the consumers for continuity of electric service to the same extent (but no greater extent) as in the absence of the lease agreements; thus, control over quality of service remains with the IOU; (3) the IOU has exclusive control of its entire system, leaving no room for assertion by the MDAs of control over distribution facilities; (4) the IOU may suspend or terminate the agreement if the arrangements result in higher energy costs for consumers, would increase the IOU's rates, reduce the IOU's net income for its stockholders, or if condemnation proceedings are instituted

> against the IOU; and (5) the IOU issues the bills, which do not show individually the rates of preference power, but only a notation that there has been a saving of a specified amount because of preference power, thus giving no opportunity to compare the quality of service or price.

P.A. 94-95. With regard to VDPS, the Commission confirmed (P.A. 100-101) the conclusions of its Administrative Law Judge ("ALJ") that, despite the "leases," VDPS: (1) had no direct responsibility for retail electric distribution, "since under the lease and operating agreements and the service contracts the [lessor] utilities perform all the utility functions"; (2) had no control of the "lessor's" distribution system; (3) could not foster competition because VDPS's "costs of operations are basically those of the utility"; and (4) could only "serve" customers who were also customers of the privately-owned utility "lessor". Initial Decision, P.A. 60-61.[6] On the basis of these fac-

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[6] VDPS, citing Appendix page 60, states that the ALJ "concluded that [VDPS] . . . has the ability to provide its service to virtually any resident of Vermont upon request." VDPS's selective quotation is misleading. In fact, the Judge qualified the cited "conclu[sion]" as follows:

> While VDPS will supply electricity to any resident on request, one condition exists, the resident must also be a customer of the privately owned utility. Otherwise, power is not available. Thus, there is no real competition for new customers.

P.A. at 60. In other words, VDPS could not "provide its service to virtually any resident" unless the resident was in fact served by the local investor-owned utility. The result is that the retail customer has no choice of electric suppliers, and the only distributor is the investor-owned utility, not the alleged public body.

tual findings, the Commission determined that neither the MDAs nor VDPS qualified as an NRA "public body," because they were not selling and distributing preference power directly at retail.

The FERC, in Opinion No. 329, also refined the "yardstick competition" standard it had developed in the prior cases, holding that an NRA "public body" must provide such competition by: (a) being the type of entity which can threaten to take over or displace the private utility; (b) substantially meeting the energy needs of *its* customers, and (c) providing a basis for comparison with investor-owned utility rates and service. A "public body" must be directly responsible for serving its retail consumers, and must control its distribution system. Opinion No. 329, P.A. at 87-89, 94.[7]

The Commission determined that VDPS and the MDAs did not meet any of these criteria, as they could not pose any competitive threat to investor-owned utilities. The Commission concluded that under the "lease" arrangements, investor-owned utility customers receive low-cost NRA "preference" power without having to create a publicly-owned power system, rendering petitioners nothing more than paper conduits for that power. As explained by the FERC:

> [T]he MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has

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[7] *See also Allegheny*, 922 F.2d at 79, P.A. at 9-10; *MEUA v. PASNY*, Initial Decision, 42 FERC (CCH) ¶ 63,018 (1988), P.A. 40-42, 54-61.

> been repeatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

On appeal, the Second Circuit affirmed the Commission's criteria and the FERC's application of the criteria to the MDAs and VDPS, emphasizing, as in *PASNY*, that "FERC is the agency that is responsible for administering the NRA," and that on questions of statutory interpretation, " 'great deference' must be accorded 'to the interpretation given the statute by the officers or agency charged with its administration.' " *Allegheny*, 922 F.2d at 80, P.A. at 12, *quoting PASNY*, 743 F.2d at 103, *quoting Connecticut Fund for Environment, Inc. v. EPA*, 696 F.2d 169, 173 (2d Cir. 1982).

REASONS FOR DENIAL OF THE WRIT

The petitions and cross-petition should be denied because they do no more than rehash arguments raised and rejected numerous times. The decision below does not conflict with either the decisions of this Court or the decisions of other circuit courts. The case involves a federal statute, but presents no major federal or constitutional question. In essence, this case concerns nothing more than an interpretation of a statute by the agency charged with its administration, and a decision by an appellate court that the agency's interpretation was a reasonable one.

1. Petitioners argue that Court review is warranted because of several alleged errors in the lower court's application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Specifically, petitioners argue that the court below

improperly deferred to the FERC where: (1) the Commission's ruling was itself based upon an erroneous reading of *MTA* (VDPS Petition at 13-15; NYCPUS Petition at 12-14);[8] (2) deference should have been accorded to PASNY (which had found that the MDAs and VDPS were NRA "public bodies"), not the FERC (VDPS Petition at 15-16; COWPUSA Petition at 27-28); and (3) the Commission's interpretation of the NRA "has changed several times". VDPS Petition at 10.

The lower court's application of the *Chevron* doctrine was appropriate. *Chevron* describes a two-step analysis to be applied when a court is faced with review of an agency's "construction of the statute which it administers":

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

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[8] It is noteworthy that cross-petitioner Rhode Island raised this same argument in its 1986 cross-petition for a writ of certiorari, which this Court denied. *See* No. 86-942, Cross Petition at 21-26; *cert. denied*, 479 U.S. 1085 (1987).

467 U.S. at 842-43 (footnotes omitted). Thus, the Second Circuit first determined that the term "public body" is "not defined in the NRA," and that, therefore, it was appropriate to review the Commission's interpretation of the term. *Allegheny v. FERC*, 922 F.2d at 81, P.A. at 14. Following this Court's *Chevron* analysis, the Second Circuit then found the Commission's three-part criteria to be "reasonable":

> Although we might not have adopted these exact criteria had we analyzed these issues in the first instance, the Commission's construction of the statutory term "public bodies" is not so unreasonable as to amount to an arbitrary and capricious action. In reviewing the Commission's construction, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the Court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, (citations omitted).

922 F.2d at 82, P.A. at 16-17. Notwithstanding the court's use of the subjunctive "might" rather than "would" (as VDPS would have it), the Second Circuit cited no instance in which its views differed from those of the Commission, stating instead its agreement with the Commission's "control" criterion. *Id.* at 84 P.A. at 20.[9]

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[9] Undaunted, VDPS claims that it has "been met with a circle of deference in which FERC concludes that its actions are compelled by prior decisions of the Second Circuit, *the Second Circuit disagrees*, but nonetheless concludes that affirmance is compelled

VDPS, joined by NYCPUS, argues that the court erred in that the Commission was entitled to no *Chevron* deference because it had wrongly found that the "key determinant of public body status," "complete operational control of distribution facilities," originated in the Second Circuit's *MTA* decision. VDPS argued:

> *MTA*, FERC stated, "*requires* that the public body *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a)(emphasis added).

Petition at 13; *see also* NYCPUS Petition at 13. VDPS goes on to argue that because *MTA* did not address the "control" issue, the Commission could not properly rely upon the decision as the basis for the "control" criterion.

The contention that the Commission, in determining that distribution system control was a "public body" criterion, incorrectly believed itself bound by *MTA*, is not supported by an accurate, complete quotation of the language of the FERC decisions in this proceeding. The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a "public body" control a distribution system; instead, the Commission stated that "the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution." Opinion No. 329, P.A. at 86 (emphasis added). The FERC's reliance then was not on *MTA*, but on the

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under *Chevron*" (Petition at 15, emphasis added). VDPS cites no support for the contention that the "Second Circuit disagrees," and the content of the court's opinion is to the contrary.

legislative history discussed in *MTA*. Shortly thereafter, the FERC stated:

> The ALJ correctly found that to "sell and distribute power directly to consumers of electricity at retail" requires direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity must have control over its distribution system.

Opinion No. 329, P.A. at 88 (footnote omitted).

Thus, the Commission's control criterion was based upon its own interpretation of: (a) NRA legislative history (discussed in *MTA*); and (b) the "sell and distribute directly" standard, which was developed by the FERC in Opinion Nos. 229 and 229-A (MMWEC and CMEEC v. PASNY, 32 FERC (CCH) ¶ 61,194 (1985)), and affirmed in *MTA* (and which this Court chose not to review). Thus, the VDPS-NYCPUS "circle of deference" argument, the linchpin of the two petitions, collapses.

Moreover, support for VDPS's claim that the control criterion was the "key determinant" of "public body status under FERC Opinion No. 329" is nowhere to be found in either the Commission or court decisions. This contention appears to be part of a strategy to disregard or finesse another of the Commission's "public body" criteria, *i.e.* that preference power purchasers must be "directly responsible" for the retail distribution of electricity directly to customers.[10] Petitioners obviously cannot meet this cri-

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[10] For example, in reviewing the ALJ's decision, VDPS states that the Judge's determination that VDPS did not qualify as an

terion because they have assumed *no* utility responsibilities. Instead, VDPS attempts to sweep the "direct responsibility" criterion within its erroneous claims about "control." Thus, VDPS argues that "control" and "direct responsibility" are treated "interchangeably" in the FERC and court orders, and then tries to mount another "circle of deference" claim, stating that the

> [D]irect responsibility criterion appears to derive from FERC's interpretation of the Second Circuit's statement in *MTA* that a public body could not supply customers indirectly, *i.e.*, at wholesale, but had to be "directly responsible" for meeting their needs. *MTA*, 796 F.2d at 593 (citing Opinion No. 229). In turn, FERC concluded that to be directly responsible *MTA* requires control of distribution facilities.

VDPS Petition at 23 n. 17.

The "direct responsibility" criterion is not "derive[d] from FERC's interpretation" of *MTA*, but is instead based on the FERC's own determination in Opinion Nos. 229 and 229-A (affirmed in *MTA*) that an NRA "public body" must be capable of direct retail distribution and cannot "arrange" for such distribution.[11] The statement that "FERC concluded that to

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NRA "public body" relies "principally" on "his control criterion." The cited pages of the decision (Initial Decision, P.A. at 60-61), in which the ALJ evaluates VDPS against the yardstick competition, direct responsibility and control criteria, do not support VDPS's assertion.

[11] As stated by the FERC in Opinion No. 229, the "requirement for direct responsibility is established by court and Com-

be directly responsible *MTA* requires control" is not accompanied by any citation and, as demonstrated above, is contrary to the language of the FERC opinion. Opinion No. 329, P.A. at 881.

It bears noting that just as the Commission did not blindly rely upon *MTA*, neither did the Second Circuit blindly defer to the FERC. The court stated that it "agree[s] with the Commission that the exercise of such control [over distribution] is essential to a finding of 'public body' status." *Allegheny*, 922 F.2d at 84, P.A. at 20. Thus, there was no abdication on the part of either the Commission or the court of their respective duties to evaluate independently the appropriate NRA "public body" criterion.[12]

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mission precedent which refer to 'direct' distribution to the retail customer." P.A. at 83 n.36 (citations omitted).

[12] In general, VDPS seems confused about who -- as between FERC and the Second Circuit -- decided what. Thus, VDPS states that

> [I]n adopting the ALJ's criteria for a public body, FERC stated that it was merely following, *inter alia*, the Second Circuit's holding in *MTA* that "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, 796 F.2d at 593; *see*, Opinion No. 329, 48 FERC at 61,466 (86a).

VDPS Petition at 7. Opinion No. 329 contains no statement, at page 86 or anywhere else, that in affirming the ALJ's criteria, FERC was "merely following . . . *MTA*." Moreover, VDPS's quote of the Second Circuit holding fails to note that the court itself was quoting -- and affirming -- the Commission's determination in Opinion Nos. 229 and 229-A. *MTA*, 796 F.2d at 593 ("[w]e therefore affirm FERC's conclusion that the term 'public bodies' . . . means 'publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity

As a fallback position, VDPS argues that the lower court also erred in that Opinion No. 329 conflicts with the "plain purpose" of the NRA. Petition at 21. That "purpose," which VDPS contends it fulfills, is to "promote 'yardstick competition' between public bodies and private utilities. *MTA*, 796 F.2d at 593." Petition at 19.[13]

The Commission explained why VDPS could neither promote such competition, nor fulfill the statutory objective:

> [S]ince VDPS leases its distribution facilities from the IOUs [investor-owned utilities], and the IOUs actually operate them, the distribution costs which are supposed to provide some part of the benchmark against which to judge IOU performance are those of the IOUs. Thus, no benchmark is possible, and VDPS does not foster yardstick competition.

Opinion No. 329, P.A. at 101.

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at retail' "). Once again, VDPS's "circle of deference" argument relies upon a misrepresentation of the agency and judicial decisions below.

[13] It is also noteworthy (though hardly surprising) that in making this argument VDPS again changes the words of the Second Circuit. The court in *MTA*, 796 F.2d at 592, 593 referred to the fostering of yardstick competition between "private utilities" and either "publicly-owned" or "municipal utilities," not "public bodies." Nonetheless, VDPS repeatedly (Petition at 19, 20 and 24) refers to "public bodies," not "municipal utilities," the phrase used by the court in *MTA*. VDPS's purpose in presenting this misstatement is obvious: yardstick competition requires, first and foremost, a publicly-owned "utility," not merely a public agency authorized to enter into "lease" arrangements which convey no substantive rights.

The Second Circuit endorsed this analysis:

> Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the objective of the NRA, it is difficult to see how the leasing arrangements at issue advance that fundamental objective.

Allegheny, 922 F.2d at 85, P.A. at 21.[14]

Petitioner COWPUSA raises here for the first time in this proceeding the claims that the Second Circuit used "legislative history" to add a "concept, 'yardstick competition,' which has no basis in law or economics and which contradicts the express purposes and intent of the statute" (COWPUSA Petition at i). Cross-petitioner Rhode Island asks the Court to "rein in" the use of legislative history. Rhode Island Cross-Petition at 7-10. These arguments do no more than betray COWPUSA's and Rhode Island's desperation. The same COWPUSA joined in a brief before the Second Circuit which states that the MDAs "provide yardstick competition as envisioned by Congress."[15]

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[14] VDPS argues (Petition at 23) that in this quote the Second Circuit was stating that the absence of distribution cost competition was the " 'most compelling' rationale cited by FERC for the imposition of an operational control requirement." The quote clearly refers to competition, not control. VDPS's characterization is wrong; the reason for its mischaracterization is transparent.

[15] "Joint Brief of MDAs and Supplemental Brief of VDPS," dated July 19, 1990, at page 20.

COWPUSA's attempt now to raise matters not raised below or even contrary to those it raised below should be rejected. *See McCullough v. Kammerer Corporation, et al.*, 323 U.S. 327, 328 (citing cases) (1945).[16]

Finally, cross-petitioner Rhode Island attempts to disown the purpose of the NRA by claiming that the " 'yardstick competition' " concept was the result of "judicial exaltation" and "was not even undisputedly accepted in the legislative history." Rhode Island Cross-Petition at 6-7. In 1984 in *PASNY*, the Second Circuit addressed this issue directly and found that the NRA preference clause was "founded" on the "yardstick competition" concept. *PASNY*, 743 F.2d at 105; *see also MTA*, 796 F.2d at 591-92. It is far too late for Rhode Island to claim that "yardstick competition" is irrelevant. In fact, Rhode Island similarly argued in 1986 that the Commission and Second Circuit had misread the legislative history. No. 86-942, Cross-Petition at 17-21. The argument has no more substantive appeal now than it did five years ago.

2. VDPS and NYCPUS contend that the Second Circuit ruling conflicts with decisions of the D.C. Circuit (VDPS Petition at 10-11; NYCPUS Petition at 13), and argue that the decision will have

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[16] Similarly, COWPUSA argues that the application of the FERC's public body criteria "intermeddl[es]" in "matters fundamentally of state and local concern." (COWPUSA Petition at 31). Instead, COWPUSA argues, state law should be used in setting "public body" standards. *Id.* This argument was not raised below, was rejected in *PASNY*, 743 F.2d at 104-105 (rejecting claim that NRA preference clause must be squared with New York law), and, therefore, constitutes no basis for the granting of a writ of certiorari.

"[p]recedential [r]amifications" for the interpretation of other "federal laws establishing preferences to cheap hydropower for states, municipalities and other public bodies" (VDPS Petition at 11-12; NYCPUS Petition at 8). The Second Circuit's decision does not conflict with rulings in other circuits. VDPS and NYCPUS compare the decision below with the District of Columbia Circuit's refusal to defer to agency findings where those holdings were based on "an erroneous view of the law."[17] The cited cases are irrelevant, for the Second Circuit did not rule that an erroneous Commission interpretation of the NRA is nonetheless entitled to deference. Instead, the court found the Commission's interpretation of the NRA to be reasonable and consistent with the court's own precedents.[18]

3. VDPS contends (Petition at 15-16) that deference should have been accorded to PASNY, not the FERC. This contention was not raised before either the Second Circuit or the FERC. As such, it should not form the basis for granting a writ of certiorari. *McCullough v. Kammerer Corporation, et al*, 323 U.S. at 328.

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[17] VDPS Petition at 10-11, citing, *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir.), *cert. denied sub nom., Meyers Industries v. Prill*, 474 U.S. 948 (1985). *See also International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986). NYCPUS Petition at 13-14.

[18] Moreover, the D.C. Circuit's rulings in the cited cases depend heavily on the subject agencies' failure adequately to explain the bases for their results, failures very much at odds with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *See Phillips*, 729 F.2d at 1167, 1169-71; *Prill*, 755 F.2d at 947-48, 956.

In any event, the argument has no merit. It is well-settled that the FERC, not a licensee (such as PASNY) has the authority to interpret and enforce license terms. *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388, 396-7 (2d Cir. 1980), *cert. denied sub nom., Penn Yan v. New York State Electric & Gas Corp.*, 454 U.S. 821 (1981). The fact that this case involves *Commission* enforcement of an article in PASNY's *Commission* license (and enforcement of a provision in the NRA) puts it in sharp contrast to the genuinely shared jurisdiction at issue in *Secretary of Labor v. Occupational Safety and Health Review Commission*, 111 S.Ct. 1171 (1991), relied on by VDPS. Moreover, the Commission has previously rejected the notion that "[d]eference, if any, belonged to PASNY, not FERC" (VDPS Petition at 15). The FERC, in Opinion No. 151, noted that it had authority to enforce the NRA license terms since "Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission." *MEUA v. PASNY*, 21 FERC at p. 61,126. *See also MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC at p. 61,644 (Commission need not defer to PASNY but may conduct *de novo* review). Thus, prior precedents dispose of the VDPS argument that PASNY, not the FERC, should be given deference.

4. VDPS, relying on the 1976 decision in *State of Vermont Public Service Board v. PASNY*, 55 FPC 1109 (1976) ("*VPSB*"), contends that deferral is improper because the Commission "several times" changed its position on VDPS's status as a "public body". VDPS Petition at 10, 16-17.

VDPS overstates the significance of *VPSB*, arguing that the Commission "explicitly held [in *VPSB*] that VDPS [the successor agency to the Vermont Public Service Board ("VPSB")] was a 'public body'. . . ." Petition at 17. In fact, the 1976 statements concerning VPSB's "public body" status were mere dictum.[19] The *VPSB* dictum was "reversed" in Opinion No. 229, and confirmed in Opinion No. 329. Thus, the alleged change in position occurred at most once, not "several" times, and any change was specifically addressed and explained in Opinion Nos. 229 and 229-A, and affirmed in *MTA*, as to which this Court denied certiorari. VDPS participated fully in those proceedings, but did not challenge before the Second Circuit the *VDPS* reversal. The court below was correct in granting "full" deference to the Commission.

Moreover, the *Chevron* deference doctrine is based on congressional delegation of authority to an agency, not on a need for finality in agency decisionmaking. 467 U.S. at 843-44. As explained in *Chevron*, in analyzing a new agency interpretation of the term "source":

> The fact that the agency has from time to time changed its interpretation of the term "source" does not . . . lead us to conclude

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[19] In *VPSB*, a dispute between Allegheny and VPSB over thirty megawatts of Niagara preference power, the Commission affirmed PASNY's determination that Allegheny should receive all of the disputed thirty megawatts. However, responding to an argument by Allegheny that VPSB did not qualify as a "public body" under the NRA because it resold preference power to investor-owned utilities, the Commission, *in a statement unnecessary to the outcome of the case*, indicated that VPSB did so qualify. 55 FPC at 1113.

> that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

467 U.S. at 863-64. *See also In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (administrative authorities may deal with changed circumstances).[20]

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), relied on by VDPS, is not to the contrary. In *INS*, the Court applied the first step of the *Chevron* analysis, ruling that the meaning of the statute at issue was clear, thereby eliminating the need for *Chevron* deference. Moreover, the Court noted that the agency was inconsistent in its own reading of the statute, even to the extent of having already abandoned the very position for which it sought affirmation on the basis of *Chevron* deference, thus discounting the need to defer to the agency. *Id.* at 446, n.30.

5. VDPS (Petition at 12), joined by NYCPUS (Petition at 8), argues that the Second Circuit's ruling "would have substantial precedential impact" in part because the Tenth Circuit recently decided a case involving the meaning of a preference provision in an-

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[20] Other cases from this Court have emphasized the continuing validity of the *Chevron* deference standards quoted above. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 453-54 (1987) (Scalia, J. concurring); *NLRB v, United Food and Com'l Workers* Union, 484 U.S. 112, 133, (1987) (Scalia, J., concurring, emphasizes continuing validity of *Chevron* in light of "dicta" in *INS*).

other statute. *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991) ("*Salt Lake*"). Both petitioners ignore that the Second and Tenth Circuit rulings are consistent, rendering review by this Court unnecessary.

The issue in *Salt Lake* was very similar to the "public body" question here, the only distinction being that the language in the applicable provision of the Reclamation Project Act of 1939, 43 U.S.C. § 485(h)(c), grants a preference in hydroelectric power sales to "municipalities," a more specific term than "public bodies." The Western Area Power Administration ("WAPA"), interpreted "municipality" to mean a municipality that operated its own utility system, *i.e.*, one with "utility responsibility." The Tenth Circuit, applying *Chevron*, deferred to the agency's definition of "municipality," rejecting appellant's notion that the Oxford English Dictionary provided a sufficiently clear meaning. *Salt Lake*, 926 F.2d at 978, quoting *Chevron*, 467 U.S. at 844, quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961). The WAPA and Tenth Circuit emphasis on "utility responsibility" is in accord with the FERC and Second Circuit criteria for "public body" status—"direct responsibility" and "control" are the very crux of "utility responsibility."

Given the complete consistency between the Second Circuit and Tenth Circuit decisions, even as to their dual reliance on *Chevron*, petitioners are forced to rely on the dissent in the *Salt Lake* case. VDPS Petition at 12, n.10. A dissenting opinion hardly establishes a conflict between circuits meriting this Court's review.

6. VDPS's final argument is that the "control" criterion is "not the product of reasoned decisionmak-

ing" (Petition at 22).[21] In essence, VDPS claims that an NRA "public body" need not be responsible for the provision of any utility services, for the delivery of any specific amount of power, or for the control of any distribution facilities.

The requirements that NRA "public bodies" be directly responsible for consumer needs, and control the distribution facilities used to deliver the power to meet those needs, flow directly from the Commission's prior and judicially-affirmed holding that NRA "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers at retail," *not* consumers or brokers. *MTA v. FERC*, 796 F.2d at 595, *cert. denied*, 479 U.S. 1085, *citing with approval*, Opinion No. 229, 30 FERC at p. 61,651; *see also* 32 FERC at p. 61,445 (emphasis in original). The FERC had elaborated on this point in Opinion No. 229-A, stating, with regard to VDPS, that

> Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party *directly responsible* for the needs of the consumers served.

32 FERC at p. 61,444 (emphasis added). Thus, the FERC stated that "control is relevant not merely to the ability to meet customers' requirements but to

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[21] VDPS ignores FERC's requirement that a public body be "directly responsible" for the needs of its customers, arguing instead that "control" and "direct responsibility" are the same thing. (Petition at 23 n. 17). VDPS, by calling "responsibility" "control," cannot finesse the indisputable fact that neither VDPS nor the MDAs have any responsibilities to customers. Opinion No. 329, P.A. at 94-97.

doing so directly. . . ." Opinion No. 329, P.A. at 83 n.36.

First, VDPS argues that "yardstick competition comes from a comparison of rates, not the individual cost components thereof". Petition at 24. VDPS is wrong. "Yardstick competition" comes from the presence of publicly and privately-owned competitors, *i.e.*, real distribution utilities which control their own distribution (and other) costs, which constitute more than an allocated share of someone else's costs. Such entities foster, rather than eliminate, yardstick competition between municipal utilities and investor-owned utilities.

Second, VDPS wrongly claims that no lessee will be able to meet the "control" standard. Petition at 24-25. FERC case law reveals many instances—in the context of both electric and gas utilities—in which lessees have gained precisely the sort of operational (and, therefore, cost) control which VDPS claims is unavailable to petitioner "lessees." By the same token, the Commission has been unwilling to find that merely possessing legal title to, or a leasehold interest in, electric facilities makes the entity a jurisdictional "public utility."[22]

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[22] *See e.g., Citizens Power and Light Corp.*, 48 FERC (CCH) ¶ 61,210 (1989); *Fort Howard Corp.*, 48 FERC (CCH) ¶ 61,303 (1989); *Hennepin Energy Resources Co.*, 48 FERC (CCH) ¶ 62,224 (1989); *Niagara Mohawk Power Corp.*, 37 FERC (CCH) ¶ 61,081 (1986); *El Paso Electric Co.*, 36 FERC (CCH) ¶ 61,055 (1986); *Portland General Electric Co.*, 33 FERC (CCH) ¶ 61,459 (1985); *United Illuminating Co.*, 29 FERC (CCH) ¶ 61,270 (1984); *Public Service Company of New Mexico*, 29 FERC (CCH) ¶ 61,387 (1984); *Pacific Power and Light Co.*, 3 FERC (CCH) ¶ 61,119

Third, VDPS' claim (Petition at 25) that the Commission has *sub silentio* reversed its NRA "public body" determination in two unrelated *Central Vermont Public Service Corporation* orders (Petition at 25 & n.20) is erroneous. In the second of those orders, 53 FERC (CCH) ¶ 61,204 (1990), after having been alerted that VDPS was relying on the FERC's mere repetition of VDPS's self-description in the Second Circuit, the Commission stated expressly that

> [I]ts findings in this proceeding were not intended to reflect on or in any way modify its findings regarding [VDPS's] status for purposes of the issues addressed in Opinion No. 329. [VDPS] can best be described as a broker acting in both the wholesale and retail markets in the State of Vermont.

Id. at 61,818.[23]

Fourth, VDPS claims this criterion is "subject to a number of irreconcilable conflicts." Petition at 26. These "conflicts" do not exist and therefore do not merit Court review. VDPS first cites (Petition at 26) the FERC's recognition that, on occasion, an indus-

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(1978).

The same distinction has been applied with respect to natural gas utilities. *See American Louisiana Pipe Line Company, et al.*, 30 FPC 1211, 1212 (1963); *El Paso Natural* Gas Company, 19 FPC 371, 372 (1958).

[23] The Commission went on to note that a statement in the first *Central Vermont* order (52 FERC (CCH) ¶ 61,278 (1990)) concerning the Department's status as a retail competitor was "from the background section of the order, . . . and was not an assertion of the Commission's position. . . ." 53 FERC at 61,818, n.9.

trial customer is served by more than one supplier (*e.g.*, when the industrial customer serves itself by generating part of the power it needs). This statement is not an admission that an NRA "public body" need not control distribution facilities (or assume utility responsibilities).

VDPS then alleges an exception concerning "borderline agreements," which are inter-*utility* agreements under which a customer located on the "border" of a utility's service territory is for practical reasons actually served using the facilities of a second utility. The Commission determined that such agreements do not violate the control requirement because both companies to a borderline contract "still control their own distribution systems and bill *their own customers*." Opinion No. 329, P.A. at 89 (emphasis supplied). Moreover, even under a borderline agreement, the utility not operating the facilities—unlike VDPS and the MDAs—retains responsibility for ensuring that service is received and that load growth needs are met.

VDPS also contends that the FERC did not "reconcile why its control criterion applies only to distribution facilities". Petition at 26. In fact, the Commission stated (Opinion No. 329, P.A. at 89) that the focus of the NRA was on distribution, not transmission, a concept endorsed by the court in *MTA*, 796 F.2d at 592, and found to be consistent with other federal preference laws. *Id.* at 592 & n.7.[24]

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[24] In so arguing, VDPS, citing the ALJ and the lower court (P.A. at 10 and 44), inaccurately identifies " 'continuity of service' " as the "Commission's justification for the" control criterion (Petition at 26-27). VDPS has left out most of the multiple

Fifth, VDPS (joined by NYCPUS, Petition at 9-10) states that competition does not require control, citing cases in the natural gas and telecommunications industry, and that FERC failed to consider this argument. In fact, FERC recognized this argument, but rejected it:

> It is true that one need not own generation, transmission and distribution facilities to engage in the utility business. However, engaging in the utility business does not qualify an entity to receive preference power under the NRA.

P.A. at 89. In the same vein, it bears repeating that the Commission concluded that:

> In contending that they should be considered innovative alternative public bodies, and in their attacks upon the ALJ's yardstick and direct responsibility criteria, the MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has been re-

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justifications for the control criterion. As stated by the ALJ:

> The authority to fix rates and conditions of service must include the power to employ cost cutting measures in distribution as well as the ability to ensure the continuity of service. Only if an entity has all of these attributes does it satisfy this criterion.

Initial Decision, P.A. at 44. The reference to the opinion in *Allegheny v. FERC*, 922 F.2d at 79, P.A. at 10, is the portion of the lower court's decision in which it recites the findings of the ALJ.

> peatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

7. COWPUSA and Rhode Island, again revealing the apparent futility of their position, claim that the FERC's public body and "yardstick competition" standards "intermeddl[e] with matters fundamentally of state and local concern," COWPUSA petition at 31, and "offend [ ]. . .principles of federalism." Rhode Island petition at 14. This is nonsense. Their position is nothing less than an attack on the constitutionality of the Federal Power Act, which after all authorizes the Commission to issue licenses "to any State or municipality" and makes it unlawful for any "State, or municipality" to construct a hydroelectric project on navigable waters without a Commission license. 16 U.S.C. §§ 797(e), 817. COWPUSA's and Rhode Island's petitions are also the first time in this case that such a broadside attack has been levied on the FERC's licensing authority. They did not raise this issue below.

As explained above, however, the FERC's authority to enforce the Commission-issued license and the NRA against state agencies was an issue in the case leading up to Opinion 229. The Commission, in those decisions, found no reason to give special deference to PASNY because it was a state agency, and the Second Circuit rejected the same claim Rhode Island again makes here. The fundamental facts here are that Congress had and has jurisdiction over the Niagara River, and that the states stand in the same shoes as any other party under the relevant provisions of the Niagara and Federal Power Acts. There is no illegal infringement on states' rights.

CONCLUSION

The Court should deny the petitions for certiorari filed by VDPS, NYCPUS and COWPUSA, and Rhode Island's cross-petition for certiorari.

Dated: July 10, 1991

Respectfully submitted,

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Nos. 90-1721, 90-1725, 90-1760 and 90-1949

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

VERMONT DEPARTMENT OF PUBLIC SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

[Caption Continued on Inside Cover]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

QUESTIONS PRESENTED

The Niagara Redevelopment Act (NRA), 16 U.S.C. 836-836a, gives "public bodies" a preference in receiving low-cost hydroelectric power from the Niagara Power Project. The questions presented are:

(1) Whether the criteria developed by the Federal Energy Regulatory Commission (the Commission) to identify "public bodies" under the NRA represent a permissible interpretation of the statute.

(2) Whether substantial evidence supported the Commission's conclusion that petitioners are not "public bodies" under the NRA.

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v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1760

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v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1949

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 922 F.2d 73. The opinion of the Federal Energy Regulatory Commission (Pet. App. 64-109) is reported at 48 F.E.R.C. ¶ 61,124. The Commission's order denying rehearing (Pet. App. 110-114) is reported at 49 F.E.R.C. ¶ 61,069.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1990. A petition for rehearing was denied on February 12, 1991. The petitions for a writ of certiorari in Nos. 90-1721 and 90-1725 were filed on May 9, 1991. The petition for a writ of certiorari in No. 90-1760 was filed on May 13, 1991. The petition for a writ of certiorari in No. 90-1949 was filed on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Niagara Redevelopment Act of 1957 (NRA) (also popularly known as the Niagara Power Project Act), 16 U.S.C. 836-836a, authorized the Federal Power Commission (FPC) to grant a license to the Power Authority of the State of New York (PASNY) to construct and operate a hydroelectric power project on the Niagara River. The NRA directed the FPC in issuing the license to PASNY to impose certain conditions "in addition to those deemed necessary and required under * * * the Federal Power Act [16 U.S.C. 791a et seq.]." 16 U.S.C. 836(b). The conditions prescribed in the NRA required PASNY "in disposing of 50 per centum of the project power [to] give preference and priority to public bodies and nonprofit cooperatives within economic transmission dis-

tance." 16 U.S.C. 836(b)(1). PASNY was also required to make a "reasonable portion" (not to exceed 20%) of that 50%—*i.e.*, up to 10% of power from the Niagara Project—available for use in neighboring States. 16 U.S.C. 836(b)(2).

The FPC issued a license to PASNY for the Niagara Project in 1958, including in the license *verbatim* the conditions prescribed in the NRA. *Power Authority of New York*, 18 F.P.C. 344 (1957); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 106 (1960). Beginning in 1978, various customers of preference power from the Niagara Project filed a series of complaints against PASNY with the FPC's successor, the Federal Energy Regulatory Commission (the Commission). The complaints concerned PASNY's allocation of Niagara Project power among preference and non-preference customers.

In 1978, a complaint against PASNY was filed by the Municipal Electric Utilities Association (MEUA), the representative of the municipal utilities in New York that received preference power. The Commission held that PASNY had violated the NRA and its license by making long-term contracts with private utilities for Niagara Project power without adequately considering the projected needs of preference customers. See *Power Authority of New York* v. *FERC*, 743 F.2d 93, 97 (2d Cir. 1984) [hereinafter *PASNY*].

The Second Circuit affirmed the Commission's holding. In rejecting challenges to the Commission's decision, the court discussed "the nature of the preference created by the [NRA]." *PASNY*, 743 F.2d at 103. The court determined that the purpose of the preference was to promote "yardstick competition" between publicly owned utilities and privately owned utilities. *Id.* at 98-100, 104-105. The prin-

ciple of "yardstick competition" was premised on a "basic determination" by Congress that "if [public bodies] * * * are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all." *Id.* at 105.

In 1980, another complaint against PASNY was filed by the associations representing preference customers in Connecticut and Massachusetts: the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC). In the ensuing proceeding, the Commission held that PASNY had improperly sold preference power to two entities—New York's Metropolitan Transit Authority (MTA) and the Vermont Department of Public Service (VDPS)—that were not "public bodies" within the meaning of the NRA. The Commission based its holding on its determination that neither MTA, which used all of the preference power itself, nor VDPS, which resold the preference power to private utilities, provided "yardstick competition" with private utilities. The Commission concluded that, in light of Congress's purpose to promote such competition, Congress intended the term "public bodies" to mean "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." [1]

The Second Circuit upheld the Commission's definition of "public bodies" under the NRA. *Metropolitan Transp. Auth.* v. *FERC*, 796 F.2d 584 (1986), cert.

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[1] *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 F.E.R.C. ¶ 61,323, at 61,651 (1985); see also *Opinion 229-A; Opinion & Order on Rehearing*, 32 F.E.R.C. ¶ 61,194 (1985).

denied, 479 U.S. 1085 (1987) [hereinafter *MTA*]. The court stated that, although the Commission's definition of "public bodies" was not compelled by the text of the statute, "the legislative history of the NRA demonstrates that [the Commission's definition] is what Congress intended the term to mean." *Id.* at 591. The court reiterated that "Congress' crystal clear intent" was to foster "yardstick competition" between public bodies and private utilities. *Id.* at 593. It agreed with the Commission that Congress believed such competition would occur only if the public entities that received preference power "distributed that power to consumers." *Id.* at 592. The court concluded that "it was implicit throughout the debates that 'public bodies' were publicly-owned entities capable of distributing the preference power they received." *Ibid.*

2. This case began in February 1986, when MEUA filed a complaint with the Commission charging that PASNY was again allocating preference power from the Niagara Project to entities that were not "public bodies" within the meaning of the NRA. MEUA's complaint concerned PASNY's allocations to municipal distribution agencies (MDAs) in New York. The MDAs had arranged to distribute preference power to retail customers by leasing the facilities of private utilities. Additional complaints were filed by MMWEC and CMEEC concerning PASNY's allocation of preference power to VDPS. After a change in state law prompted by the *MTA* proceeding, VDPS had entered into lease agreements with private utilities similar to those entered into by the MDAs. See Vt. Stat. Ann. tit. 30, § 212a (1986). In a consolidated proceeding, the ALJ determined that neither VDPS nor the MDAs were entitled to preference power because they are

not "public bodies" under the NRA. Pet. App. 26-27, 54-63. The Commission adopted the ALJ's decision. *Id.* at 89-101.

a. In accordance with the Commission's pre-hearing order, the ALJ formulated three criteria for identifying "public bodies" under the NRA.[2] He then found that neither VDPS nor the MDAs satisfied any of these criteria.

First, the ALJ stated, "[a]n NRA public body must provide yardstick competition." Pet. App. 40. This requirement, he noted, had been identified in *MTA* as Congress's purpose for creating the "public bodies" preference. *Ibid.* (quoting *MTA*, 796 F.2d at 593). To provide yardstick competition, the ALJ determined, a public body must pose "a threat of takeover or displacement to the investor owned utilities." *Id.* at 40-41. It must also provide "a meaningful opportunity for consumers and regulators to compare the rates and quality of service of the public utility with that of investor owned utilities." Pet. App. 41. Finally, it must "substantially meet the energy needs of its customers." *Ibid.*

In addition to providing yardstick competition, the ALJ determined, "[a]n NRA public body must be

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[2] The Commission's order posed three issues for determination:

> (1) How may governmental entities which lease distribution facilities from investor-owned utilities qualify as NRA "public bodies?"
>
> (2) Does an NRA "public body" need to compete with investor-owned utilities for customers in order to perform a yardstick competition function?
>
> (3) What other responsibilities, if any, must a governmental entity assume to qualify as a "public body" under the NRA?

Pet. App. 27-28.

directly responsible to retail consumers for the electric energy sold and delivered to them." Pet. App. 41. This second requirement, the ALJ observed, had previously been adopted by the Commission and upheld by the Second Circuit in *MTA*. The Commission had held that VDPS could not qualify as a public body merely by reselling preference power to private utilities because, "[a]lthough VDPS did arrange for distribution services [through resale], [it was not] the party *directly responsible* for the needs of the consumers served." *Ibid.* (quoting *Opinion 229-A*, 32 F.E.R.C. at 61,444 (emphasis supplied by ALJ)).

Finally, the ALJ found, "[a]n NRA public body must have control over the distribution system." Pet. App. 42. The ALJ derived this requirement from the Commission's prior conclusion that "only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA." *Id.* at 43 (quoting *Opinion 229*, 30 F.E.R.C. at 61,651). The ALJ determined that "[t]o be capable of 'distributing power directly' means to have control of the distribution system so as not to have to rely on, or be constrained by anyone else, and to have a direct seller-customer relationship with each customer." *Ibid.*

Applying these criteria to the MDAs, the ALJ found that MDAs are not public bodies because, under their lease arrangements with private utilities, the private utilities retain control over distributing preference power to retail customers. Pet. App. 54-57. Under the leases, the private utilities reserved exclusive control over the leased facilities and remained exclusively responsible for supplying the needs of retail customers and ensuring continuity of service. *Id.* at 54. The private utilities also reserved the right to suspend or terminate the leases under a variety of

circumstances that prevented the MDAs from exercising "independence of action" in improving rates and quality of service. *Id.* at 55. Moreover, the bills sent to retail customers did not allow any comparison between the private utilities' service and that available from the MDAs. *Id.* at 55-56.

Based on "virtually identical" (Pet. App. 58) leases between VDPS and private utilities in Vermont, the ALJ also concluded that VDPS is not a "public bod[y]." *Id.* at 57-61. The ALJ found that VDPS satisfied only one of the elements of providing yardstick competition; it "suppl[ied] a substantial percentage of Vermont's residents' needs for electricity." *Id.* at 60. VDPS did not, however, furnish retail customers with a basis for comparing the cost or quality of service. *Ibid.* Nor did VDPS have direct responsibility to retail customers for the service provided. Instead, the private utilities reserved exclusive control over distribution and retained full responsibility for providing service. *Id.* at 60-61. The terms of VDPS's leases "le[ft] no room for control by VDPS." *Id.* at 61.

b. The Commission adopted the ALJ's decision. Pet. App. 64-109. The Commission held that the three elements of yardstick competition articulated by the ALJ were "appropriate": "If these elements are absent the customer does not have a real choice among competitors." *Id.* at 88. The Commission also upheld the other two criteria for "public bodies" identified by the ALJ. *Id.* at 79-83, 86-89.[3] Finally, the

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[3] The Commission agreed with the ALJ that public entities do not have to own the system for distributing preference power to satisfy the second criterion—direct responsibility to consumers for distribution of power; instead, the requisite control can be achieved through proper leasing arrangements. Pet. App. 88. The Commission similarly sustained the ALJ's

Commission sustained the ALJ's conclusion that neither VDPS nor the MDAs are "public bodies" under the NRA. *Id.* at 89-101.

3. The court of appeals affirmed. Pet. App. 1-24. The court initially determined that the Commission's interpretation of the NRA and of PASNY's license should be reviewed under the two-part analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that the Commission's factual findings should be upheld if supported by substantial evidence. Pet. App. 12-13.

The court upheld the Commission's criteria for identifying "public bodies" for purposes of the NRA. Pet. App. 13-17. The court observed that "the term 'public body' is not defined in the NRA." *Id.* at 14. The court determined that, in giving content to that term, the Commission properly elaborated upon its prior conclusion that "in order to qualify as a 'public body' an entity must actually deliver its energy to retail customers." *Id.* at 15. The Commission's interpretation, the court held, appropriately "strikes a delicate balance":

> While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Id. at 17.

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conclusion that the third criterion can be satisfied if a public body meets "substantially" all of its retail customers' needs, thereby affording public entities a measure of "flexibility." *Id.* at 88-89.

The court further held that substantial evidence supported the Commission's conclusion that neither VDPS nor the MDAs are "public bodies." Pet. App. 17-23. The court observed that the findings on which that conclusion was based "encompass all of the specific points" that petitioners contended had not been considered. *Id.* at 18. In making those findings, the court held, the Commission properly relied on the terms of petitioners' lease agreements with the private utilities that distributed the preference power. *Id.* at 19. The court agreed with the Commission that, under the leases entered into by the MDAs, "all responsibility for [distribution] operations rested with the IOU [*i.e.*, investor-owned utility]." *Ibid.* The court similarly determined that under its leases VDPS "ha[d] no responsibility for the maintenance, construction, or operation of the distribution facilities" (*id.* at 20-21) and was "essentially * * * precluded from competing with the IOUs on a cost basis" (*id.* at 21). "If spurring competition is the objective of the NRA," the court concluded, "it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective." *Ibid.*

ARGUMENT

The court of appeals properly applied *Chevron*, *supra*, to review the Commission's criteria for identifying "public bodies" under the NRA and correctly concluded that those criteria represent a permissible interpretation of a statute of limited geographic scope. The court was also correct in affirming the Commission's conclusion that petitioners are not "public bodies" for purposes of the NRA. Further review is therefore not warranted.

1. Petitioners contend that the court of appeals improperly relied on *Chevron*, *supra*, in reviewing the

Commission's interpretation of the NRA. They argue that (1) the Commission's interpretation does not reflect the exercise of independent judgment; (2) PASNY's interpretation rather than the Commission's is entitled to deference from a reviewing court; and (3) the Commission's interpretation violates the plain language and intent of the NRA. These arguments do not withstand analysis.

a. Petitioners VDPS and New York City Public Utility Service (NYCPUS) contend (VDPS Pet. 12-15; NYCPUS Pet. 12-14) that the Commission "never exercised its discretion" (VDPS Pet. 12) in this case. Instead, they assert, the Commission considered its decision to be "mandated" by the court of appeals' decision in *MTA*. VDPS Pet. 12-13; NYCPUS Pet. 12-13. That assertion is incorrect.

As the court of appeals stated, the proceedings in this case reflected the Commission's "attempt to clarify further the requisite characteristics of a 'public body.'" Pet. App. 15. At the outset of the proceeding, the Commission issued an order directing the ALJ to "develop criteria for determining when an entity that does not own a distribution system may qualify as a public body." *Id.* at 83 n.36; see note 2, *supra*. Pursuant to the order, the ALJ received extensive evidence and briefing aimed at formulating a set of criteria based on statutory sources and on Commission and court precedent. See Pet. App. 28-44. The criteria ultimately adopted by the ALJ "expand[ed] on concepts * * * initially articulated in *PASNY* and *MTA*." *Id.* at 16.

The Commission correctly viewed the ALJ's criteria as the product of discretionary decision making, and it adopted them because they accorded with the purpose of the NRA and with precedent. The Commission upheld the criterion requiring that a public

body control the distribution system as "a logical interpretation of the precedent." Pet. App. 83 n.36. It held that the requirements for yardstick competition were an "appropriate" way of furthering the purpose of the NRA. *Id.* at 88. Similarly, it upheld the requirement that a public body meet substantially all of its customers' needs as permitting needed "flexibility." *Ibid.*

b. The court of appeals correctly held that the Commission's criteria for identifying "public bodies" deserve "great deference." Pet. App. 12. Congress entrusted the Commission with the responsibility to ensure that PASNY complies with the license for the Niagara Project. The Commission's authority derives from both the NRA and the Federal Power Act. 16 U.S.C. 836(a); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-124 (1960) (Federal Power Commission had authority under the FPA, 16 U.S.C. 814, to condemn property for Niagara Project). The Commission developed its criteria in the course of determining whether PASNY had complied with its license. The criteria thus represent "an executive department's construction of a statutory scheme it is entrusted to administer," and as such are entitled to "considerable weight." *Chevron*, 467 U.S. at 844.

In contending that PASNY's interpretation of the NRA, not the Commission's, is entitled to deference, petitioner VDPS relies (VDPS Pet. 10, 16) on this Court's decision in *Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171 (1991). As petitioner concedes (Pet. 16), however, there are "obvious[]" differences between this case and *Martin*. *Martin* concerned the "unusual regulatory structure" (111 S. Ct. at 1176) of split federal enforcement created in the Occupational Safety and Health Act of

1970. In contrast, under the NRA and the FPA, the Commission is the only agency responsible for enforcing PASNY's compliance with the license for the Niagara Project. Pet. App. 12-13; see *Opinion 229-A*, 32 F.E.R.C. at 61,451 n.12; see also *PASNY*, 743 F.2d at 108 (labelling "doubtful" PASNY's argument that it was entitled to more deference than other licensees of the Commission). For present purposes, PASNY's role is more that of regulatee rather than regulator, and it is the Commission in which Congress has reposed responsibility to enforce the legislative will. Furthermore, because the Commission's responsibilities under the FPA extend to federal power projects across the nation, it clearly has greater expertise than PASNY to decide issues concerning the allocation of power. For all these reasons, the logical conclusion is that Congress intended to invest the Commission, not PASNY, with discretion in interpreting the NRA. Cf. *Martin*, 111 S. Ct. at 1176-1177.

c. Likewise without merit is petitioners' contention that the Commission's "public bodies" criteria violate the plain language and intent of the NRA. At the outset, petitioners are mistaken in relying on "plain language" arguments. See VDPS Pet. 17-22; COWPUSA Pet. 12-24. As the court of appeals observed, "the term 'public body' is not defined in the NRA." Pet. App. 14. The court properly reviewed the Commission's criteria to determine whether they are "based on a permissible construction of the [NRA]." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

In upholding the Commission's criteria as "consistent with the history and purposes of the NRA" (Pet. App. 24), the court of appeals was guided by its prior decisions in *PASNY* and *MTA*. *Id.* at 6-8,

14-17. The court in those cases had held that Congress's "crystal clear intent" in the NRA was to promote "yardstick competition" between publicly owned and privately owned utilities. *MTA*, 796 F.2d at 593; see also *PASNY*, 743 F.2d at 104-107. The court here determined that the Commission's criteria were resonable means of promoting "yardstick competition":

> The Commission's "public body" test strikes a delicate balance. While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Pet. App. 17.

Petitioners NYCPUS and VDPS concede that the purpose of the "public bodies" preference is to provide "yardstick competition"; they contend, however, that the Commission's criteria go beyond what Congress considered necessary to ensure such competition. NYCPUS Pet. 11-12; VDPS Pet. 20-21.[4] Spe-

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[4] Petitioner COWPUSA takes a different tack, arguing that " 'yardstick competition' is a nonsensical economic doctrine which is neither expressly nor implicitly part of the intent or purpose of the NRA" (COWPUSA Pet. 10-11), and that the principle of "yardstick competition" violates the Tenth Amendment because it infringes on the authority of States to apply state law in allocating preference power from the Niagara Project (*id.* at 29-34). In *PASNY* and *MTA*, the Second Circuit considered all of the arguments that COWPUSA raises here and correctly rejected them. See *PASNY*, 743 F.2d at 106 (NRA preempts conflicting state law regarding allocation of preference power from Niagara Project); see also *id.* at 104-106 (discussing "yardstick competition"); *MTA*, 796 F.2d at 591-593 (same). And in *MTA* this Court denied certiorari. 479 U.S. 1085 (1987).

cifically, they assert that (1) Congress intended public bodies to compete only in the supply, not in the distribution, of preference power; and (2) Congress intended only regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities. NYCPUS Pet. 11; VDPS Pet. 20. Based on these assertions, petitioners argue that the Commission's criteria violate Congress's intent by requiring that public bodies control the system for distributing preference power and that consumers be able to compare the cost and quality of service.

The chief difficulty with petitioners' argument is that nothing in the text or history of the NRA supports petitioners' particularized view of congressional intent. Petitioners base their argument exclusively on one sentence in the *MTA* opinion:

> The municipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

796 F.2d at 592, quoted at NYCPUS Pet. 11 and VDPS Pet. 20. Petitioners obviously err in treating the court's statement as if it were statutory text. Moreover, petitioners misread the court's statement. Indeed, the court in *MTA* rejected the argument renewed here that control over distribution was irrelevant to a public entity's status as a "public bod[y]." *MTA*, 796 F.2d at 593 ("public bodies" must be "capable of selling *and distributing* power directly to consumers of electricity at retail") (emphasis added).[5] Moreover, the court in *MTA* never sug-

[5] See also *MTA*, 796 F.2d at 592 ("[I]t was implicit throughout the debates that 'public bodies' were publicly-owned en-

gested that Congress intended only regulators, not consumers, to be able to compare the service provided by private utilities to that provided by "public bodies." It is therefore not surprising that the court in this case saw no inconsistency between the Commission's criteria and the court's prior decision in *MTA*.

At bottom, petitioners' challenge to the Commission's criteria is based on their view that the Commission could have developed a less restrictive definition of "public bodies." [6] Even if that is so, it provides no basis for setting aside the Commission's decision. A reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction." *Chevron*, 467 U.S. at 843 n.11. The Commission's criteria for identifying "public bodies" are fully consistent with the language and intent of the NRA and were therefore properly upheld by the court of appeals.[7]

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tities capable of distributing the preference power they received.").

[6] Petitioners NYCPUS and VDPS cite *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983), in arguing that competition in a regulated industry can be achieved without requiring "yardstick competition." NYCPUS Pet. 9-10; VDPS Pet. 27-28. These decisions are inapposite, and petitioners' arguments beside the point, in light of Congress's purpose in the NRA to encourage yardstick competition, not simply competition of any sort. The Commission properly rejected such arguments, observing that the Second Circuit had previously refused to "second-guess [Congress's] basic determination." Pet. App. 84-85 (quoting *PASNY*, 743 F.2d at 105).

[7] Cross-petitioner contends (Cross-Pet. 4-14) that States should be entitled to receive preference power without regard

2. Petitioners NYCPUS and VDPS contend that the Commission erred in concluding that neither VDPS nor MDAs qualified as "public bodies." VDPS Pet. 16-28; NYCPUS Pet. 10-14 & nn.11-14. The court of appeals properly rejected that contention, observing that petitioners' arguments on this score "are nothing more than veiled attempts at collaterally attacking the 'public body' criteria." Pet. App. 18. As such, petitioners' arguments have been answered above.

The ALJ and the Commission found that neither VDPS nor the MDAs satisfied any of the three criteria for "public bodies." Pet. App. 44-61, 89-101. That finding was based on express restrictions in the lease agreements with private utilities into which VDPS and MDAs had entered. *Id.* at 54-56, 60-61, 94-95, 100-101. Under those agreements, the private utilities retained exclusive control of the distribution system and remained exclusively responsible for meeting the needs of retail customers. *Ibid.* Moreover, the agreements did not permit retail customers to compare the service provided by the private utilities to service provided by the public entities. *Id.* at 55-56, 60, 95, 101. There was thus ample evidence to support the conclusion that neither VDPS nor the MDAs qualified as "public bodies."

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to whether in using it they provide "yardstick competition." The court of appeals correctly rejected that argument. Pet. App. 21-22. This is not a situation in which congressional attention was focused on the activities of private persons; to the contrary, the statutory text at issue applies to "public bodies." The legislative history of the NRA convincingly shows that Congress intended "public bodies" to provide "yardstick competition." Nothing in the text of the NRA or in the legislative history suggests that Congress intended to except States from this requirement.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 90-1721, 90-1725, 90-1760 and 90-1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

[Caption Continued on Inside Cover]

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY OF VERMONT DEPARTMENT OF PUBLIC SERVICE TO BRIEFS OPPOSING ITS PETITION FOR A WRIT OF CERTIORARI

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COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,

Respondents.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, Et Al.,

Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, Et Al.,

Respondents.

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ARGUMENT

I. *CHEVRON* IS INAPPLICABLE WHERE AN AGENCY ADOPTS A STANDARD BASED ON THE MISTAKEN ASSUMPTION THAT THE STANDARD IS MANDATED BY STATUTE, CASE LAW OR LEGISLATIVE HISTORY

Respondents in this case, the Federal Energy Regulatory Commission (FERC) and several parties who intervened in support of FERC in the case below,[1] have filed briefs in opposition to the petition for writ of certiorari filed by the Vermont Department of Public Service (VDPS or Vermont). However, neither FERC nor those supporting it questioned this basic proposition of law presented in Vermont's petition: If an agency wrongly believes that its application of an ambiguous statute is mandated by law it has not exercised its own discretion and is not entitled to deference from a reviewing court under *Chevron*.[2]

VDPS demonstrated in its petition that FERC erroneously believed the control criterion incorporated into its definition of "public body" was mandated by the Niagara Redevelopment Act (NRA). FERC's response does not refute this point, but indicates that FERC *still* believes its control criterion was mandated by the Act. According to FERC, the control requirement is a "logical interpretation of the precedent." FERC Br. pp. 11-12. The Second Circuit, however, already has said that neither the statute itself nor

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[1] The Connecticut Municipal Electric Energy Cooperative and the Massachusetts Municipal Wholesale Electric Company, the Allegheny Electric Cooperative, Inc., City of Cleveland, the Municipal Electric Utilities Association of New York State, and the Public Power Association of New Jersey.

[2] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*").

prior case law mandates any of the several public body criteria adopted by FERC (14a). Where an agency has been proceeding on a "mistaken assumption" about the statute, it is not for the reviewing court to supply a justification on the agency's behalf. *Dept. of Treasury v. FLRA*, 110 S. Ct. 1623, 1629-30 (1990). *See also Phillips Petroleum Co. v. FERC*, 792 F.2d. 1165, 1169 (D.C. Cir. 1986). Thus, even if an independent rationale for the control criterion could be devised and defended by FERC in the exercise of its discretion, it has not exercised that discretion here and, contrary to the Second Circuit's holding, is not entitled to deference under *Chevron*. *Id.*

The brief of intervenors in support of FERC similarly reinforces rather than defuses Vermont's argument. Intervenors do not dispute that FERC believed itself bound to adopt the control criterion. Instead, they advance the curious argument that the source of FERC's belief was the legislative history of the NRA, rather than prior case law:

> The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a 'public body' control a distribution system; instead, the Commission stated that 'the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution.' Opinion No. 329, P.A. at 86 (emphasis added). *The FERC's reliance then was not on MTA but on the legislative history discussed in MTA.*[3]

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[3] *"MTA"* refers to *Metropolitan Transportation Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Electric Cooperative, Inc. v. FERC*, 479 U.S. 1085 (1987).

Int. Br. at 12-13 (emphasis added.)

This is a distinction without a difference. Whether FERC misread prior case law or legislative history, its decision is not entitled to deference if it erroneously "believe[d] the standard to be dictated by the statute itself" rather than "adopted as a matter of policy in order to effectuate the purposes of the Act." *International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987). See also *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, concurring in relevant part.) The *source* of FERC's error, i.e., the text of the statute, the legislative history or prior case law, is plainly irrelevant.[4] "When the [agency] bases a decision on a standard that it unjustifiably believes was mandated by Congress, the [agency's] decision must not be enforced, even though the [agency] might be able to adopt the very same standard in the exercise of its discretion." *International Brotherhood*, 814 F.2d at 708. Here, FERC's mistaken assumption that a public body is required to have physical control of a distribution system was an error which clearly "infected its promulgation" of a public body definition, *Planned Parenthood*, 712 F.2d at 667,[5] and the Second Circuit incorrectly applied *Chevron* when it deferred to that definition.

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[4] See, e.g., *Prill v. NLRB*, 755 F.2d 941, 952 n.66 (D.C. Cir.) *cert. denied* 474 U.S. 948 (1985) (NLRB found to be "mistaken in its view that the language, history *and* prior interpretation of § 7 left it without discretion to consider adopting a broader interpretation of the [NLRA] Act." (emphasis added)).

[5] Intervenors supporting FERC appear to argue that the agency's decision is sustainable on the basis of its "separate" direct responsibility criterion. Int. Br. pp. 13-14. However, as Vermont

II. DEFERENCE, IF ANY, WAS DUE PASNY, NOT FERC.

If the Second Circuit owed any deference in this case, it was to the Power Authority of the State of New York (PASNY), not FERC. Vermont Pet. pp. 15-16. FERC responds to this argument by asserting that, unlike *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171 (1991) (*Martin*), this case involves no "split enforcement" structure and that "it is the Commission in which Congress has reposed responsibility to enforce the legislative will." FERC Br. p. 13.

Intervenors supporting FERC unwittingly, but directly, refute this assertion with a passage from one of FERC's own orders. Maintaining that "prior precedents dispose of the VDPS argument" (Int. Br. at 20), Intervenors cite FERC's statement in Opinion No. 151 that "*Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission.*" *Id.* (quoting *MEUA v. PASNY* (Opinion No. 151), 21 FERC ¶ 61,021, at 61,126 (1982) (emphasis added).[6]

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noted in its petition, the Commission treated these criteria interchangeably, affirming its Administrative Law Judge's decision that "to be directly responsible, a public body * * * must control the distribution system." (73a). In any event, under *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), a reviewing court may not assume that, unencumbered by its erroneous view that the control criterion was required, FERC would have adopted the same definition of public body. *See also, Dept. of Treasury v. FLRA*, 110 S. Ct. at 1629-30.

[6] Citing this Court's per curiam decision in *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945), Intervenors also assert that since the *Martin* issue was not raised before the Second Circuit it cannot form the basis for granting a writ of certiorari. Int. Br. p. 19. This Court, however, has no such

This separation of functions brings the instant case squarely within the framework of *Martin*, which, in turn, overrides any prior FERC assertions that PASNY is not entitled to deference. The Occupational Safety and Review Commission's (OSHRC) role, as described in *Martin*, was not policy-fashioning, but adjudicatory. Because the Secretary of Labor, not OSHRC, had day-to-day responsibilities for administering the statute, the Court held that Congress intended to invest interpretative power in the Secretary. *Martin*, 111 S. Ct. at 1177. Similarly, it is PASNY, not FERC, which bears responsibility for allocating preference power, setting rates for that power and assuring its transmission. FERC's self-described role in the process is purely adjudicatory:

> We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

Opinion No. 229-A, 32 FERC ¶ 61,194, at 61,451 n.12 (1985).[7] In these circumstances the Second Circuit should not have deferred to FERC.

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ironclad standard. See *Vance v. Terrazas*, 444 U.S. 252, 258, n.5 (1980); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc.*, 340 U.S. 211, 214 (1951). More important is that the error cited in Vermont's petition was the Second Circuit's decision to defer to FERC. That error did not occur *until* the Second Circuit rendered its opinion. Finally, the *Martin* decision was not issued by this Court until *after* the Second Circuit's decision. The applicability of an intervening decision of this type is an appropriate subject of a petition for writ of certiorari. *Vandenbank v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941).

[7] FERC's further assertion that it should be given deference

III. THE SECOND CIRCUIT ERRED IN DEFERRING TO AN AGENCY STANDARD WHICH DENIES PUBLIC BODY STATUS TO PUBLIC ENTITIES WHICH SATISFY THAT COURT'S OWN STATED UNDERSTANDING OF THE STATUTE'S INTENT

FERC correctly observes that under the Second Circuit's 1986 decision in *MTA* the " 'crystal clear' intent of the statutory preference for public bodies is to promote yardstick competition." (FERC Br. p. 5, 14). Yardstick competition itself, it bears repeating, is not a term found in the statute. If, however, promotion of yardstick competition is the purpose of the NRA, then public entities which provide yardstick competition must be public bodies. Conversely, any definition of public bodies that denies public body status to such yardstick competitors is inherently arbitrary and cannot be entitled to deference from a reviewing court. The Second Circuit held in *MTA* that public entities whose retail rates can be compared by regulators to those charged by private utilities provide

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because its "responsibilities under the FPA extend to federal power projects across the nation", thereby giving it "greater expertise than PASNY to decide issues concerning the allocation of power" (FERC Br. p. 13), is simply untrue. While FERC has a very limited, "appellate body" role in *rate*-setting for federal power marketing agencies, *United States v. City of Fulton*, 475 U.S. 657, 663 (1986); *CP National Corp. v. Bonneville Power Administration*, 928 F.2d 905, 911 (9th Cir. 1991), most agencies charged with marketing federal preference power *allocate* that power without *any* FERC role, even an adjudicatory one. (The various federal preference power statutes are identified in Vermont's petition, p. 11 n.9). Where reviewing courts have found an ambiguity in the statutory allocation scheme, they have given those agencies deference. See, *e.g.*, *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991). PASNY, not FERC, is the counterpart of those agencies.

yardstick competition. As VDPS has pointed out, there was no dispute from the Commission that VDPS provided the requisite regulatory yardstick. *Id.*[8] VDPS argued, therefore, that the Second Circuit's error was in deferring to a FERC definition of yardstick competition which expressly held that only public entities which facilitated consumer comparisons, not regulatory comparisons, would qualify as public bodies. Vermont Pet., p.20. When FERC adopted a standard holding that only *some* yardstick competition qualifies, it strayed so far from the statutory text as to remove any basis for a court to defer to its interpretation. *Id.*

FERC simply has no answer to this argument. Instead, it answers an argument VDPS never made. According to FERC, VDPS has contended that "Congress intended *only* regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities." FERC Br. p. 15 (emphasis

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[8] Vermont petition, p. 20 (citing *MTA*, 796 F.2d at 592). Oddly, FERC accuses Vermont of error "in treating the court's statement [in *MTA*] as if it were statutory text." FERC Br. p. 15. It is FERC which has adopted a public body definition wholly divorced from the text of the statute. Indeed, in the same paragraph of its brief where FERC criticizes Vermont for reliance on the Second Circuit's *MTA* decision, FERC cites the decision for the proposition that the NRA *requires* a public entity to control a distribution system in order to qualify as a public body—the very proposition which the Second Circuit *did* reject in the case now before this Court (14a).

added).[9] VDPS has never contended that a public entity whose rates and services can be compared by consumers to those of private utilities is not a public body.[10] The Second Circuit's error was in affirming a public body definition which excluded public entities capable of providing a regulatory yardstick, *i.e*, yard-

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[9] FERC misstates another argument made by Vermont in attempting to bolster its claim to deference. According to FERC, VDPS has ignored the requirement of *MTA* that a public body be "capable of selling *and distributing* power directly to consumers at retail," FERC Br. p. 15 (quoting *MTA* 796 F.2d at 593 (emphasis in original)), and instead has argued that "competition in a regulated industry can be achieved without requiring 'yardstick competition'." FERC Br. p. 16 n.6. Vermont has argued nothing of the sort. In *MTA* the Second Circuit held that "*[y]ardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers.*" 796 F.2d at 592 (emphasis added). What Vermont has pointed out is that, as in the telecommunications and natural gas industries, access to, not control of a distribution system is all that is necessary to compete in selling and distributing power to ultimate consumers (Pet. pp. 27-28), and that FERC had never given a reasoned explanation why more was demanded of a public body. *Id.* The lower court itself seems erroneously to have assumed that only "active management control over the distribution of preference power" was being required (17a) rather than the complete *operational* control of the distribution facilities actually required in Opinion No. 329 (73a, 80a-83a, 88a). Management control over the distribution of preference power, of course, is achieved if the public body has *access* to the facilities used to distribute its power (36a).

[10] On the contrary, we argued to the lower court—and reiterated in our petition here—that FERC erred in failing to consider a Vermont statute which mandates a comparison on consumer bills between the rates of VDPS and private utilities (Vermont pet. p. 7, n. 7; 20a, n.1).

stick competition as that court *itself* had defined the term.

Respectfully submitted,

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Nos. 90-1721, 90-1725, 90-1760, 90-1949

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND THE RHODE ISLAND PUBLIC UTILITIES COMMISSION,
Cross Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Cross Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PUBLIC SYSTEMS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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OCTOBER TERM, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

NEW YORK CITY PUBLIC UTILITY SERVICE, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PUBLIC SYSTEMS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Allegheny Electric Cooperative, Inc., the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative, the Massachusetts Municipal Wholesale Electric Company, the Municipal Electric Utilities Association of New York State and the Public Power Association of New Jersey (collectively referred to herein as "Public Systems"), file this supplemental brief in opposition to the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949 in order to bring

to the attention of the Court new matter that was not available at the time Public Systems filed their primary brief in opposition. Sup. Ct. Rule 15.7.

Petitioners Vermont Department of Public Service (Petition at 12, 19) and New York City Public Utility Service (Petition at 8) rely on the dissent in *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991), in partial support of their petitions.

In *Salt Lake*, all deadlines for parties to seek further review after the denial of rehearing expired on July 17, 1991. No petition for a writ of certiorari was filed and the *Salt Lake* decision is now final in all respects.

There was never any basis for certiorari in reliance on a dissent. There certainly is none now given the finality of the *Salt Lake* majority decision.

The Court should deny the pending petitions for writs of certiorari.

Dated: August 9, 1991

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